IN THE

Supreme Court of the United States

October Term, 1960

No. 12

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,

Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER

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Opinions Below

The opinions below (R. 2078, Ops. 1; R. 2652, Ops. 91, modified at R. 2694, Ops. 122; R. 2699, Ops. 124)[1] are reported in 223 F. 2d 531; 254 F. 2d 314 (modified by an unreported memorandum of April 11, 1958, R. 2694); and 277 F. 2d 78.

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[1] By leave of the Court, the printed record includes the five volume record filed when this case was here before (No. 48, Oct. Term, 1955). The record now has a sixth printed volume, paginated to follow the first five volumes. As the parties have stipulated, volume V is obsolete. The entire record before the Board has also been filed pursuant to the Court's Rule 21(3).

We use "R." to refer to the printed record, and "Tr." to refer to the original record of the Board's proceedings. "Ops." refers to the volume of Appendices to our petition for certiorari, in which all the opinions below are collected. Citations to the opinions in the body of this brief will be exclusively to that volume.

Jurisdiction

The judgment below was entered on July 30, 1959 (R. 2708). A timely petition for rehearing was denied on August 27, 1959 (R. 2709). The petition for certiorari was filed on November 23, 1959, and was granted on February 5, 1960 (R. 2723). The Court's jurisdiction derives from section 14(a) of the Subversive Activities Control Act of 1950,[2] 64 Stat. 1001, 50 U. S. C. 793(a), and 28 U. S. C. 1254.

Statutes Involved

The pertinent provisions of the Subversive Activities Control Act of 1950, as amended, the Immigration and Nationality Act, the Communist Control Act of 1954, and the Social Security Act, are set forth in the Appendix to this Brief.

Questions Presented

1. Whether the provisions of the Subversive Activities Control Act of 1950, as amended, and as supplemented by section 5 of the Communist Control Act of 1954, relating to Communist-action organizations and their members, are unconstitutional on their face or as applied in this case.

2. Whether the order of the Board and the decision below rest on an erroneous construction of the Act's definitions of a Communist-action organization and the world Communist movement and on an erroneous construction and application of the Act's standards of proof.

3. Whether the order of the Board is unsupported by the preponderance of the evidence.

4. Whether all testimony of the Attorney General's witness Budenz should have been stricken because prior statements relating to his testimony, demanded by petitioner while he was on the stand, were not produced until he was no longer available for cross-examination.

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[2] The Subversive Activities Control Act of 1950, as amended, is Title I of the Internal Security Act of 1950, 64 Stat. 987, and is hereafter referred to as the Act.

5. Whether the Board and the court below erred in refusing to require production to petitioner of prior statements made by witnesses for the Attorney General on subjects concerning which they testified.

6. Whether the court below, having stricken one of the key findings on which the Board based its order, erred in refusing to remand the proceeding for administrative redetermination.

Statement of the Case

This case presents for review a decision of the court below (Judge Bazelon dissenting) affirming an order of the Board that petitioner register as a Communist-action organization under section 7 of the Act. The litigation is before the Court for the second time. *See Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115.

The Act

The Act was passed on September 23, 1950, over the President's veto,[3] shortly after the outbreak of the Korean War. It authorizes the Board to determine on petitions of the Attorney General whether accused organizations shall be required to register as "Communist-action" or "Communist-front" organizations (sec. 13) or shall be declared

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[3] The legislation had also been opposed by the A. F. of L., C.I.O., Brotherhood of Railroad Trainmen, National Farmers Union, Society of Friends, American Unitarian Association, National Fraternal Council of Negro Churches, American Civil Liberties Union, Americans for Democratic Action, American Association of University Professors, National Association for the Advancement of Colored People, Council for Social Action of Congregational Christian Churches, United Council of Church Women, American Jewish Congress, Women's International League for Peace and Freedom, National Council of Jewish Women, American Veterans Committee, National Community Relations Advisory Council, many distinguished individuals, more than twenty major newspapers, and numerous local groups. Hearings before Committee on Un-American Activities, H.R., 81st Cong., 2d Sess., on H.R. 3903 and 7595 (March 1950); Hearings before the Committee on the Judiciary, Sen., 80th Cong., 2d Sess., on H.R. 5852 (May 1948); 96 Cong. Rec. A6135, A6620-22, A6724-26, A7397, A7275-80; see R. 185.

"Communist-infiltrated" organizations (sec. 13A, added by sec. 10 of the Communist Control Act of 1954). The latter, although not required to register, are deprived of the benefits of the National Labor Relations Act (sec. 13A(g)).

A Communist-action organization is defined by section 3(3) as an organization which

> "(i) is substantially directed, dominated or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 * * *, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 * * *"

The "world Communist movement" is found by section 2(4) to be under the control of the Communist dictatorship of an unnamed foreign country. Sections 2(1), (5) and (6) find that this movement seeks by any means deemed necessary, including force, sabotage, terrorism, etc., to overthrow capitalist governments and replace them by totalitarian dictatorships subservient to the controlling foreign dictatorship; and that it establishes and utilizes for this purpose Communist-action organizations in various countries. Section 2(15) recites that the "Communist organization in the United States" presents a clear and present danger to the security of the United States.

Section 13(e) of the Act establishes eight criteria for the Board to consider in determining whether an organization is a Communist-action organization.[4]

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[4] A Communist-front organization is defined, in substance, as one which is controlled by a Communist-action organization and is primarily operated to aid a Communist-action organization, a Communist foreign government, or the world Communist movement (sec. 3(4)). A Communist-infiltrated organization is defined, in substance, as one which is controlled by individuals who are, or have been within three years, engaged in giving support to a Communist-action organization, a Communist foreign government or the world Communist movement, and is serving, or within three years has served, as a means for giving support to any such organization, government or movement, or for the impairment of the military or industrial strength of the United States (sec. 3(4A)).

A Communist-action organization is required to register as such with the Attorney General. The registration statement must show the names and addresses of the organization's officers and members, give a detailed accounting of all moneys received and expended, and list all printing and duplicating facilities. Annual reports must be filed to keep the registration up to date. The registration statement is open for public inspection. (Sec. 7.)

When a registration order becomes final, as it does on exhaustion of judicial review (sec. 14(b)), the officers of the organization have a duty to register the organization and to list its members (sec. 7(h)). Members not so listed are under a duty to register themselves after an administrative determination of their membership (secs. 8, 13(a)). Failure to comply with these duties is punishable by imprisonment up to five years and fine up to $10,000, for each day of default. Each falsity in a registration statement is punishable by a similar penalty. (Sec. 15.)

The listing or self-listing of members of petitioner in compliance with a registration order is affected by section 5 of the Communist Control Act, 68 Stat. 777, 50 U. S. C. 844, which enumerates thirteen criteria for determining "membership" in the Communist Party.

Any person whose name is listed on a registration statement as an officer or member of, or a contributor to, the organization is in jeopardy of prosecution under section 4(a) of the Act [5] as well as under the Smith Act.

In addition, the entry of a final registration order automatically makes operative crippling sanctions against the organization and its members. These sanctions apply whether or not the organization registers.

[5] Section 4(a) makes it criminal to conspire "to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship" under foreign control.

The sanctions are the following:

(1) The organization must label publications and literature which it distributes by mail or in interstate or foreign commerce as being disseminated by a Communist organization, which according to section 2 is a participant in a foreign-controlled seditious conspiracy. Its radio and television broadcasts must be announced as sponsored by a Communist organization. These requirements apply without regard to the nature and content of the publications and broadcasts. (Sec. 10.)

(2) Members of the organization may not hold nonelective federal employment, employment in any privately owned "defense facility," or office or employment in labor unions; nor may they represent employers in matters arising under the National Labor Relations Act (sec. 5). A "defense facility" is any establishment listed by the Secretary of Defense on his *ex parte* determination that the security of the United States requires such listing (secs. 3(7), 5(b)). Accordingly, what employment is open to members of the organization rests in the unreviewable discretion of the Secretary of Defense.

(3) Government employees and employees of "defense facilities" are prohibited from contributing funds or services to the organization (sec. 5(a)(2)), and even from subscribing to its publications (sec. 3(6)). Accordingly, the *ex parte* determination of the Secretary of Defense limits the sources from which the organization can obtain funds or services or find readers of its material.

(4) Members of the organization may not hold or apply for passports (sec. 6).

(5) Naturalized citizens who join or affiliate with the organization within five years after naturalization are subject to revocation of citizenship. Alien members of the organization are excluded from admission into the United States; if already in the country, they must be deported.

An alien may not be naturalized if he was a member of the organization within ten years preceding the filing of his naturalization petition.[6]

(6) Contributions to the organization are not tax deductible, and the organization itself is denied tax exemptions (sec. 11).

(7) Service in the employ of the organization after the order becomes final is not considered employment for social security purposes (42 U. S. C. 410(a)(17)).

The prohibitions described in the first four paragraphs above are enforceable by criminal penalties of up to five years imprisonment and $10,000 fine (sec. 15).

The sanctions on the members described in paragraphs (2), (4), (5) and (7) above, apply regardless of their personal innocence and lack of knowledge of alleged illegal or conspiratorial actions or purposes, and though their activities are confined to constitutionally protected areas.[7]

History of the Proceeding

On November 22, 1950, the Attorney General petitioned the Board to order the petitioner herein to register as a Communist-action organization (R. 143).

On April 20, 1953, following an administrative hearing, the Board issued a registration order against petitioner (R. 138) and a Report containing its findings (R. 1-137). The Report made findings adverse to petitioner under each of the eight criteria of section 13(e). On the totality of these findings the Board concluded that the petitioner is a Communist-action organization.

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[6] Originally contained in secs. 22 and 25 of the Act, these sanctions have been carried forward by secs. 212(a)(28)(E), 241(a)(6)(E), 313(a)(2)(G), and 340(c) of the Immigration and Nationality Act, 66 Stat. 163, 8 U. S. C. 1182, 1251, 1424, 1451.

[7] The sanctions against Communist-front organizations and their members differ from the foregoing only in a few ameliorating details.

On review, the court below struck the findings under the fifth and seventh criteria of section 13(e) as not supported by the evidence (Ops. 71, 74). These were (1) that petitioner reports to the Soviet government and (2) that petitioner engages in secret practices for the purpose of concealing foreign control and promoting its objectives. Nevertheless, the court proceeded to hold the Act constitutional and to affirm the order of the Board. Judge Bazelon dissented on the ground that the Act violates the fifth Amendment privilege against self-incrimination (Ops. 76).

This Court reversed, without reaching the other questions presented, because of the denial below of petitioner's motion for leave to adduce evidence that three of the Attorney General's witnesses were perjurers. *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115.

Upon remand, the Attorney General did not controvert petitioner's allegations of perjury by the three witnesses, and the Board therefore expunged their testimony (R. 2174-75). On December 18, 1956, the Board issued a Modified Report (R. 2406) and a recommendation (R. 2644) that the court below affirm the registration order.

On January 9, 1958, the court below ordered the case again remanded to the Board (Ops. 91), and on April 11, 1958, it enlarged the scope of the remand (Ops. 122). This decision ruled that the principles of the "Jencks" statute (18 U. S. C. 3500) were applicable to administrative proceedings. It held that the Board had erred in refusing to require the production of certain documents involving the Attorney General's witness Markward and statements made by the witness Budenz to the FBI on two matters ("the Starobin letter" and "the Weiner conversation") concerning which he had testified. The court, however, refused to require the production of Budenz' FBI statements on other matters concerning which he had testified. It also refused to require production of memoranda which the Attorney General's witness Gitlow had furnished the FBI concerning the subject of his testimony. Judge Bazelon dissented from the latter two rulings (Ops. 121, 123).

In the ensuing administrative proceeding, the Board furnished petitioner with excerpts from Budenz' FBI statements which it considered relevant to the Starobin and Weiner matters. The recall of Budenz for cross-examination with the aid of these statements proved impossible because of his ill health. Petitioner moved to strike all of his testimony because of his unavailability. The Board denied the motion, but struck Budenz' testimony on the Starobin and Weiner matters. (R. 2387-93.) Petitioner also moved for production of statements made to the FBI by all the Attorney General's witnesses on matters relating to their testimony. The motion was denied. (R. 2338, 2344-46.)

On February 9, 1959, the Board issued its Modified Report on Second Remand (R. 2375), in which it readopted the first Modified Report with certain amendments,[8] and again recommended affirmance of the registration order (R. 2402).

Both the first and second Modified Reports found under section 13(e)(7) that petitioner engages in secret practices for the purpose of promoting its objectives (R. 2631), notwithstanding that this finding had been stricken by the court below in its initial decision.

The court below adhered to its previous view that the Board's finding on secret practices was unsupported by the evidence. Nevertheless, it again affirmed the order of the Board (Ops. 126). Judge Bazelon dissented on the grounds (1) that the invalidity of the Board's finding on secret practices required a remand of the proceedings for administrative redetermination and (2) that all of Budenz' testimony should have been stricken (Ops. 132).

[8] These are listed in an appendix to the second Modified Report (R. 2403-05), and indicated in an appended text of the first Modified Report (R. 2377, 2406).

The Documents and Witnesses

The Modified Report states that "the really vital part of [the Attorney General's] case is documentary evidence, which to a considerable extent needs relatively little oral illumination" (R. 2411, ftn. 5). The documents referred to fall into three categories.

The first consists of historical and theoretical Communist writings which long antedated the Act, such as the *Communist Manifesto* of 1848, writings of Lenin and Stalin in the 1920's or earlier, and resolutions and reports of the Communist International (dissolved in 1943, R. 2485), of which the most recent is dated 1935 (R. 2414-16).

The second category consists of petitioner's constitution and writings of American Communists showing that petitioner, as it has always acknowledged (R. 182), adheres to Marxist-Leninist principles (e.g., R. 2414, 2546-47). Most of the documents in these two categories were before the Court in *Schneiderman* v. *United States*, 320 U. S. 118, and *Yates* v. *United States*, 354 U. S. 298.

The third category of documents comprises exhibits introduced to show that petitioner and the Soviet Union had similar views on a series of international questions. These documents were supplemented by the testimony of a university professor that they showed such a similarity. (R. 2580-81.)

The remainder of the Attorney General's evidence consists of the testimony of sixteen former members of petitioner,[9] relating almost exclusively to periods antedating the Act. None of these witnesses gave significant testimony concerning post-Act matters. (See *infra*, pp. 106-08.)

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[9] The Attorney General called 22 witnesses. As already stated, all the testimony of three (Crouch, Matusow and Johnson) was stricken following the first remand to the Board. Two other witnesses merely translated or identified documents. (R. 2646-50.)

The case for petitioner was presented through three witnesses. Two had for many years been members of the petitioner's national committee. The third testified as an expert on Communist doctrine. (R. 2650-51.) The testimony of these witnesses and the documentary evidence introduced through them portrayed petitioner's purposes, policies and activities from the time of its reconstitution as a political party in 1945. This evidence shows petitioner as a self-governing, independent American political party which is an adherent of Communism and seeks by peaceful means to persuade the American people that they should adopt a socialist system. (Ops. 51-54; R. 1199-1241, 1257-97.)

Organizational History of Petitioner

Petitioner was organized in 1919 (R. 2413), and until 1940 was an affiliate of the Communist International, a world-wide organization of Communist Parties (R. 2459). In 1940, petitioner disaffiliated from the Communist International in order to avoid registration under the then newly-enacted Voorhis Act (R. 2512; Ops. 64-65), which required registration of organizations affiliated with international political bodies. 54 Stat. 1201; 18 U. S. C. 2386. In 1943, the Communist International dissolved (R. 2485; Ops. 60). Petitioner has had no foreign affiliation since 1940.[10]

In 1944, petitioner dissolved and formed the Communist Political Association. In 1945, petitioner reconstituted itself as the Communist Party. The reconstitution followed

[10] The only international organization of Communist Parties which existed at any time after 1943 was the Communist Information Bureau, organized in 1947 by certain European Communist Parties (Ops. 60; R. 2487). The Bureau dissolved subsequent to the administrative hearing in this case. As the court below and the Board found (Ops. 65; R. 2492), petitioner was not affiliated with the Bureau, and the uncontradicted evidence is that it had no dealings or relations with it (R. 1209-10, 1286-89).

the appearance in a French Communist journal of an article by Jacques Duclos, a leading French Communist, which criticized the dissolution of the Party and the policies of Browder, then chairman of the Association. (R. 2517-18.)

Evidence and Findings Concerning the Relations Between Petitioner and the Soviet Union

Much of the Attorney General's evidence was designed to establish that petitioner had been controlled by the Soviet Union through the Communist International during petitioner's affiliation with the latter organization. There is no evidence that at any time after its 1940 disaffiliation from the Communist International petitioner received any directives or orders from abroad, and the Board found none. The record discloses only a few insignificant and innocuous contacts and communications of any kind between petitioner and the Soviet Union or its citizens since 1940—as, for example, that in 1949 petitioner wired Stalin congratulations on his 70th birthday (see *infra*, pp. 99-100).

The evidence on which the court below sustained the Board's order was summarized by the court as follows (R. 2842):

> "But the facts beyond dispute are that there is a Communist Party in Europe, based upon Marxism-Leninism, and in power in Soviet Russia; that our present petitioner was for years a member of the Communist International, and its separation from that organization was not accompanied by a repudiation, either of objectives or of methods; that it is by its own choice named the Communist Party of the United States of America, a self-imposed description not to be ignored without reason; that it once forsook the line laid down by the Communist Party abroad but, upon being severely brought to task by a leading European Communist in an open letter to Communists, reorganized itself, even to the extent of expelling its erring leader, and went back to the

line[11]; and that, save for that period of waywardness, it has never differed from the program and policy of the Communist Party abroad and has always adhered to that program and policy even in sharp changes."

Summary of Argument

ONE

The Act is unconstitutional on its face and as applied.

I.

The Act and the Board's order violate the First Amendment.

A. If the registration order becomes final, it will outlaw petitioner. Petitioner and its members will be governmentally branded and quarantined. The sources from which petitioner can obtain funds, services and readers will be curtailed. Petitioner's members will be denied employment, prohibited from travel abroad, subjected to loss of naturalized citizenship, and, if aliens, deported. These consequences will occur whether or not petitioner registers.

If petitioner registers, its officers will expose themselves to prosecution and become informers on its members. If the officers do not register petitioner, they and petitioner will be liable to astronomical criminal penalties. Peti-

[11] The reference is to the article by Duclos and the 1945 reconstitution of the Communist Party (*supra*, pp. 11-12). Contrary to the court's statement, the evidence is uncontradicted that the Duclos article was not written to bring petitioner "to task," but was directed to French Communists in answer to questions raised by many of them regarding developments in America, and that petitioner's reconstitution, though undoubtedly influenced by Duclos' analysis, was the product of its own independent decision (R. 1280, 1291-96; A. G. Ex. 208, p. 656).

tioner's members will then be faced with a choice between the catastrophic consequences of self-registration and criminal penalties for non-registration.

The Act, therefore, does not contemplate disclosure by registration. The function of the order is to lay a foundation for mass prosecutions for non-registration and to subject petitioner and its members to intolerable sanctions.

By outlawing petitioner, the Act suppresses all advocacy by and association with petitioner, and thus abridges First Amendment rights.

B. This suppression cannot be justified, along the lines asserted by the Act, as a protection against danger to the national security, because issuance of a registration order is not contingent on the organization's engaging in acts or advocacy dangerous to the national security.

A registration order requires proof of two components, foreign control and advancement of the objectives of the world Communist movement referred to in section 2. The existence of foreign control obviously does not of itself establish that the organization's activities are inimical to the national security.

If the objectives component merely refers to the establishment of "Communist totalitarian dictatorships" without regard to the means employed, it is satisfied by peaceable advocacy and activity. If the component includes the means referred to in section 2, it is satisfied merely by a showing of willingness to use illegal means in some undefined future contingency. In neither case is there a clear and present danger for First Amendment purposes. If the objectives component is construed to require the present use or incitement of illegal means, the construction would condemn the application of the Act in this case, since no finding of such use or incitement was or could have been made.

C. The Act also violates the principle that even when the legislature may constitutionally restrict speech, press or assembly to prevent a substantive evil, the restriction must not be broader than necessary for prevention of the evil. The Act's restraints are not limited to speech, press and assembly used to incite to unlawful conduct. Instead, by outlawing petitioner the Act suppresses all of petitioner's activities, including its admittedly extensive peaceable advocacy and assembly.

The First Amendment requirement of economy is violated not only by the Act as a whole, but by each of its major sanctions considered individually. The requirement to label the organization's mail and broadcasts cannot be justified as a safeguard against incitement since it applies regardless of content. Similarly, the sanctions on petitioner's members are not limited to control of unlawful or seditious conduct.

D. The Act imposes a prior restraint on First Amendment rights by requiring registration as a condition to the exercise of those rights, contrary to *Thomas* v. *Collins*. This restraint is made even more onerous by the requirement that the registration statement list the names of the organization's members. The validity of these prior restraints is not supported by *New York ex rel. Bryant* v. *Zimmerman*, which in any event is unsound when tested by First Amendment principles.

II.

The Act violates the privilege against self-incrimination since the registration order against petitioner compels admissions of membership or office-holding in the Communist Party and of participation in the conspiracy described in section 2 of the Act.

Section 4(f) does not grant immunity from prosecution for all matters to which the compelled admissions relate. Hence the immunity is not coextensive with the constitutional privilege and cannot save the Act.

The rule of *United States* v. *White* is inapplicable because the officer incriminates himself not by the contents of the organization's records, but by signing and filing the registration statement, and thus identifying himself as a member and officer of petitioner. Furthermore, the Act does not call for production of the organization's records, but requires the officers to prepare and file original statements. And these must contain information which may not appear in the organization's records.

Adjudication of the question of privilege is not premature. Petitioner's officers will have no opportunity to assert the privilege if petitioner cannot claim it for them now. If the officers claim the privilege as a reason for not filing a registration statement they thereby identify themselves as petitioner's officers and thus incriminate themselves. The privilege has not been waived by the officers and the immunity statute, 18 U. S. C. 3486, is inapplicable. Because petitioner and its members are for this purpose identical, petitioner may assert their privilege as an objection to listing, and thus incriminating, them.

III.

The sanctions on the members violate due process because (1) they apply regardless of the member's personal innocence and lack of knowledge of the claimed character of the organization; (2) they establish conclusive disqualifications and do not permit a member to prove that he is a fit person to enjoy the privileges of which he is deprived; (3) they have no real or substantial relation to any legitimate federal objective, since they exclude members from non-sensitive employment and from travel abroad for innocent purposes and denaturalize them for reasons unconnected with fraud or lack of allegiance.

IV.

The Act violates due process because it predetermines facts essential to the determination that petitioner is a Communist-action organization.

Under section 3(3), there can be a Communist-action organization only if there is a world Communist movement of the character described in section 2. However, neither the Board nor the reviewing courts are authorized to determine the existence and nature of such a movement. Instead, these "facts" are found legislatively in section 2 and are then incorporated into section 3(3) as assumptions of fact which the Board and the courts must accept and which petitioner may not contest. Moreover, these essential "facts" are also presupposed by the criteria of section 13(c), which the Board is obliged to apply in making its decision. Even if the Act were construed to leave these issues open to Board determination, the Board would not be able to determine them impartially, since realistically it could not decide that the Congressional findings are untrue.

Section 2 also finds that there is a Communist-action organization in the United States. The Board could not make a contrary determination without overruling Congress and the findings which justify the Board's creation.

Congress even predetermined the specific identification of petitioner as the domestic Communist-action organization. This appears from the debates and the reports, from the fact that the section 2 description of the Communist-action organization in the United States contains verbatim excerpts from Judge Hand's description of petitioner in the *Dennis* case, and from section 4 of the Communist Control Act.

V.

The Act is a bill of attainder and violates Art. I, Sec. 9, cl. 3; Art. III, Sec. 2, cl. 3, and the Fifth and Sixth Amendments, because it imposes punishment without a judicial trial.

Registration under the Act is punishment because it entails self-defamation, self-ostracism, self-incrimination, and identification of the registrant and his associates as objects of onerous statutory sanctions and public invidium.

The registration *order is penal* because it outlaws the organization and all its activities, and is not confined to the prevention of deleterious conduct.

The sanctions have no rational relation to, and are unnecessary for, protection of the national security. Their purpose, therefore, is to punish. A member can escape the sanctions by leaving the organization. But this forced disassociation is itself punishment, and destroys and thus punishes the organization.

The Act establishes a mechanism to prosecute accused persons for their failure to register themselves as criminals. Its only purpose, therefore, is to punish Communists as criminals without proof of crime.

The legislative history confirms that the Act was designed to punish petitioner and its members.

VI.

The Board's determination that petitioner is a Communist-action organization will be conclusive in prosecutions of petitioner and its officers for failure to register petitioner and in prosecutions of members for failure to register themselves, holding forbidden employment, or applying for passports. As to this element of the crimes, therefore, the accused is denied a judicial trial, indictment by grand jury, and trial by petit jury, in violation of the Fifth and Sixth Amendments and Art. III. Sec. 2, cl. 3.

VII.

The Act violates due process because the Board is necessarily biased and has an interest in deciding adversely to petitioner.

At the time the registration order was issued, the Board's sole function was to identify Communist-action organizations, their members, and Communist-front organizations. By definition, there can be no front organization

in the absence of an action organization. The only Communist-action organization envisaged by the Act is petitioner, as both the Attorney General and the Board have recognized. The Board, therefore, could not have decided for petitioner without rendering itself and the Act *functus officio*. Irresistible pressure was thus generated by the Act upon the agency to decide in the only way which would preserve the Act and the agency—*i.e.*, against petitioner.

Moreover, the members of the Board had a personal interest in ruling against petitioner so as to preserve further business for themselves. By ruling otherwise they would have lost their jobs, salaries, and appointment patronage. The Board's staff had a similar job interest in seeing that the order was adverse to petitioner.

VIII.

The Act violates due process because the standards it establishes for the administrative adjudication are vague and irrational.

The objectives component of the definition of a Communist-action organization is vague because the objectives of the world Communist movement cannot be ascertained from section 2.

An examination of each of the eight criteria of section 13(e) discloses that they have no reasonable relation to the ultimate facts to be established under the 3(3) definition. Section 3(3) is also vague because the Act does not indicate whether a registration order must be supported by adverse findings under all or only some of the eight criteria and because of the ambiguous prefatory term "the extent to which."

IX.

The Act violates due process because of the impact of section 5 of the Communist Control Act. Section 5 establishes criteria for determining membership in petitioner.

These must be applied by petitioner and its officers in preparing a registration statement, by persons desiring to know whether they may lawfully hold certain jobs or apply for passports, and by the Board in proceedings to compel alleged members to register themselves.

The criteria of section 5, however, are vague and irrational, and their application requires a knowledge of facts which petitioner, its officers and other persons cannot have or obtain.

TWO

The Board and the court below misconstrued and misapplied the Act.

I.

The Board and the court misconstrued and misapplied the foreign control component of section 3(3).

A. This component, properly construed, requires proof that the Soviet Union (1) issues orders to the accused organization and (2) has some means for enforcing compliance with these orders. Furthermore, control will normally be accompanied by supervision and reporting to insure compliance with the orders. The component is not satisfied by an organization's voluntary adherence to Soviet policies or objectives.

B. The decision below and the Modified Report show on their face that the order is not supported by proof of foreign control as correctly defined. There is no finding or evidence that the Soviet Union gives orders to petitioner or that it has any means by which it could exact compliance with such orders if given. Nor does the Modified Report cite any evidence that petitioner reports to or is supervised by the Soviet Union. In fact, the Modified Report cites no significant contacts between petitioner and the Soviet Union after petitioner's disaffiliation from the Communist International in 1940.

The court below misconstrued the foreign control component, holding that it is satisfied by voluntary compliance with Soviet directives, without a means for exacting compliance. Even this erroneous construction is not satisfied because neither the Board nor the court found, or could have found, any Soviet directives to petitioner after petitioner's 1940 disaffiliation from the Communist International.

II.

The Board and the court below misapplied the objectives component of section 3(3).

The objectives referred to in this component are obscure, but presumably are (1) overthrow of capitalist governments by force or other illegal means, and (2) establishment of a "Communist totalitarian dictatorship," which (3) will be subservient to the Soviet Union.

Because of First Amendment considerations, an organization cannot be found to be advancing the first objective by peaceable advocacy. It must actually engage in or incite illegal action. The Board did not, and could not, make such a finding against petitioner.

The Board found that the objective of Communism is to establish a dictatorship of the proletariat. Such a dictatorship does not correspond to the Act's definition of "Communist totalitarian dictatorship." Hence the second objective was not, and could not be, found.

The Modified Report does not, and could not, find that petitioner seeks to advance the third objective of establishing in this country a government subservient to the Soviet Union.

III.

The Board and the court below erroneously relied on evidence of conduct discontinued before enactment of the Act.

The issue under the Act is whether petitioner was a Communist-action organization at the time of the administrative proceeding or, in any event, after enactment of the Act. Evidence of prior conduct was relevant only so far as it illuminated relevant post-Act conduct.

The overwhelming mass of the evidence and evidentiary findings relate to the period before the Act, mostly before 1940. The meagre post-Act evidence is a mixture of irrelevant matters and petitioner's ideological adherence to Communism.

The Board and the court below held that petitioner was under Soviet control when affiliated with the Communist International, and that neither petitioner's 1940 disaffiliation nor the International's 1943 dissolution were of consequence because both petitioner and the Soviet Union continued to adhere to Communist principles. This theory was erroneous. Petitioner's separation from the International and the dissolution of the latter terminated all means and manifestations of Soviet control. It is irrelevant that petitioner thereafter adhered to its previous views and agreed with the Soviet Union. For the adherence and agreement were voluntary, not products of control.

IV.

A detailed examination of the Board's application of each of the standards of section 13(e) shows that the Board violated the Act by employing irrational interpretations of the section and by relying on irrelevant matters.

V.

The court below misconstrued and misapplied the Act's definition of "world Communist movement."

The court below found that there is a world Communist movement in the sense that there are Communist parties in various countries which have a common outlook and work

for the revolutionary attainment of a classless, stateless society. This is not the movement described by section 2, the key characteristics of which are a highly-centralized world-wide organization, rigid Soviet control, and use of violent and criminal means, if necessary. Neither the Board nor the court found, nor does the evidence show, that a movement with these characteristics exists.

VI.

The order of the Board is not supported by a preponderance of the evidence, as required by the Act. The Modified Report and the opinions below show on their face that the evidence does not satisfy the section 3(3) definition, any of the criteria of section 13(e), or the section 2 description of the world Communist movement.

THREE

I.

The Board and the court below erred in refusing to strike all the testimony of the Attorney General's witness Budenz.

At the original Board hearing, petitioner moved for the production of statements made by Budenz to the FBI on two matters concerning which he had testified, the Starobin letter and the Weiner conversation. The motion was denied.

The court below eventually ordered the production of the statements. But by the time they were produced, Budenz could not be further cross-examined because of his ill health. The Board thereupon struck Budenz' testimony on the Starobin and Weiner matters, but refused to strike the rest of his testimony. The court below sustained this action.

The refusal to strike all of Budenz' testimony was erroneous if the deprivation of petitioner's right to cross-

examine him was due to the fault of the Board or the Attorney General or if it represented a material loss to petitioner. The deprivation was the fault of the Board, which made the original erroneous ruling, and of the Attorney General, who had objected to the production of the statements and who had withheld the fact that the statements existed. Moreover, deprivation was a material loss because it prevented petitioner from being able to discredit all of Budenz' testimony by showing that he had testified falsely on the Weiner and Starobin matters.

Examination of Budenz' FBI statements and his testimony indicates that Budenz had concocted his testimony on the Weiner and Starobin matters and that this could have been established on cross-examination.

II.

A. The Board and the court below erred in refusing to require production of statements of the Attorney General's witness Gitlow.

In his testimony, Gitlow identified and explained the contents and significance of various documents. He had previously prepared for the FBI memoranda interpreting the documents. The Board denied petitioner's motion for production of the memoranda.

The court below held that the Board's action was erroneous, but refused to remand the case on the ground that petitioner's only remedy, which it had not utilized, was to file with the court an independent motion for leave to adduce the memoranda as additional evidence. Petitioner thereupon filed such a motion, but the court denied it on the ground that it was too late to cure the procedural defect.

The court erred in both rulings. A denial of the right of cross-examination is remediable on the petition for review of the agency's order and does not require an inde-

pendent motion for production of evidence. But if the motion procedure was required, it was error to deny relief when the motion was filed.

3. The court erred in denying petitioner's motion for production of all statements made by Budenz to the FBI relating to subjects on which he testified. The court held that petitioner was not entitled to the production of the statements because it had not demanded them at the original hearing. But petitioner was not required to make such a demand at the original hearing because it would have been futile under already announced Board rulings that a witness' prior statements were producible only if it were first shown that the statements were inconsistent with his testimony.

The court also ruled that petitioner's motion was a "fishing expedition" and came too late. But the demand conformed to the procedure specified in 18 U. S. C. 3500 and contemplated in *Jencks* v. *United States*. And it came when it did because the government had previously misled petitioner into believing the statements did not exist.

C. For the reasons stated in the preceding section, the court below also erred in denying petitioner's motion for the productions of all statements, as defined in 18 U. S. C. 3500, which had been made by witnesses for the Attorney General and which related to the subject matter of their testimony.

III.

The court below, having stricken a key finding of the Board, erred in not remanding the case for administrative redetermination.

The court below struck, as unsupported by the evidence, the Board's finding under section 13(e)(7) of the Act that petitioner engages in secret practices for the purpose of promoting its objectives. Since this was a key finding, the court was obliged to return the case for administrative re-

determination. The court's refusal to do so is contrary to section 14 of the Act and the principle that administrative orders must be judged on the grounds on which they are based.

ARGUMENT

PART ONE: THE UNCONSTITUTIONALITY OF THE ACT AND THE ORDER

I. The Act and the order violate the First Amendment.

A. The Act and the Order Outlaw Petitioner and Thus Suppress Advocacy by and Association With It.

If the registration order becomes final, it will outlaw petitioner. For the order will have the following consequences *whether or not petitioner registers*:

(1) Petitioner, its members and supporters, will be governmentally branded as participants in the foreign-controlled, seditious conspiracy described in section 2 of the Act. Petitioner will also be required to defame itself by invidiously labelling its publications and broadcasts (see *supra*, p. 6). The order will thus subject petitioner and its members to public opprobrium and ensuing social and economic reprisals, and make it impossible for them to obtain public consideration of their views on the merits.

(2) The sources from which petitioner can obtain funds, services, and readers of its publications will be drastically curtailed by the provisions of sections 5(a)(2) and 3(6) (see *supra*, p. 6).

(3) Any person who remains or becomes a member of petitioner will be denied private and public employment, deprived of the right to travel abroad, subjected to loss of naturalized citizenship, and, if an alien, deported. He will incur these disabilities regardless of his personal innocence

and lack of knowledge of any illicit activities by petitioner. (See *supra*, pp. 6-7.)

(4) Any other organization which associates with, or supports the views of, petitioner or its members will risk condemnation as a front or infiltrated organization under the evidentiary standards of sections 13(f) and 13(A)(e) of the Act. Any individual who has dealings with petitioner or its members will risk incurring the disabilities of membership in petitioner by virtue of the expansive criteria of section 5 of the Communist Control Act for determining petitioner's "members" (*infra*, pp. 89-93). The order will, therefore, quarantine petitioner and its members, denying them access to the public and the public access to their ideas.

Registration by petitioner in compliance with the Board's order will have additional consequences. The officers who execute the registration statement will expose themselves to prosecution under the extravagantly vague provisions of section 4(a) of the Act and under the Smith Act.[12] They will become informers on the members by listing their names in the registration statement, thereby exposing the members to public opprobrium, possible prosecution, loss of employment, and application of the Act's sanctions.

On the other hand, if the officers do not register, they and the organization will be liable to the astronomical, cumulative penalties of section 15. Furthermore, petitioner's members will then be faced with a choice between the catastrophic consequences of self-registration and the criminal penalties for non-registration.

Accordingly, the Act offers petitioner and its members the illusory alternative of suicide by registration or execution for non-registration.

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[12] Furthermore, the organization and its officers incur astronomical criminal penalties for the inevitable "false statements" and "omissions" in the list of members, which are induced by section 5 of the Communist Control Act. See *infra*, pp. 88-94.

The Act cannot be justified as a disclosure statute. No legitimate disclosure statute defames and imposes destructive penalties on those who comply with it by registering. Nor does it make registration an act of self-exposure to criminal and civil penalties created by the legislation itself.

The Act does not contemplate, therefore, that a registration order will be complied with. The true function of the order is to lay a foundation for the mass prosecution of petitioner's officers and members for non-registration, to subject them and petitioner to the other sanctions of the Act, and thus to outlaw petitioner.

The Court has recognized that a defamatory listing by the Attorney General, even without public disclosure of the names of the members and the numerous sanctions of the Act, has the effect of virtually destroying the listed organization. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 139, 142, 161, 175. And the Court has on First Amendment grounds invalidated requirements for the public identification of dissenters for the reason that "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." *Talley* v. *California*, 362 U. S. 60; *Bates* v. *Little Rock*, 361 U. S. 516; *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449.

The Act goes far beyond the measures invalidated in the three cases last cited. By outlawing petitioner it proscribes, and does not merely deter, all advocacy by and association with petitioner. In what follows we will show that this abridgment of First Amendment rights does not have a constitutional justification and is therefore invalid

B. The Act's Suppression of Advocacy and Association Is Not Constitutionally Justified Because the Registration Order Need Not Be and Was Not Based on Conduct Which Endangers the National Security.

The First Amendment prohibits legislative restrictions of speech, press and assembly which do not create a clear and present danger of substantive evils that Congress has

a right to prevent. *Schenck* v. *United States*, 249 U. S. 47, 52. Congress sought to bring the Act under this principle by finding in section 2(15) that its enactment was necessary to guard against "a clear and present danger to the security of the United States and to the existence of free American institutions."

The Act, however, cannot be justified on this ground. For it authorizes the issuance of a registration order against an organization which does not engage in conduct endangering the national security even remotely, much less clearly and presently. Moreover, the order against petitioner was issued and affirmed without evidence or findings that petitioner engages in conduct that threatens the national security. Accordingly, the Act violates the First Amendment both on its face and as applied.[13]

Section 3(3) of the Act defines Communist-action organizations in terms of two characteristics which we call the "foreign control component" and the "objectives component". Neither of these involves activities which endanger the national security or are unlawful.

The foreign control component requires that an accused organization be "substantially directed, dominated or controlled" by the Soviet Union. Proof that a domestic organization is under Soviet control does not *ipso facto*

[13] The Congressional finding of a clear and present danger has no constitutional significance. Since the First Amendment is a limitation on the legislative power, it must be applied by the courts. Otherwise Congress could escape the limitation merely by a self-serving declaration that the legislation is valid. Accordingly, "The doctrine that there must be a clear and present danger of a substantive evil that Congress has a right to prevent is a judicial rule to be applied as a matter of law by the courts." *Dennis* v. *United States*, 341 U. S. 494, 513. Moreover, the existence of a clear and present danger depends on the content of a particular expression and the circumstances of its dissemination. It must therefore be determined on the facts presented by each case as it arises and cannot be legislatively found in advance.

establish that the activities of the organization are inimical to the national security. If the activities are peaceable and innocent, they cannot be dangerous, regardless of the nature and control of the organization which performs them. This is true under the correct construction of the foreign control component, which, as we later show, requires that the Soviet Union have and exercise some means for compelling the organization to comply with Soviet directives. *A fortiori* it is true under the loose conception adopted below, that the foreign control component is satisfied by voluntary ideological adherence to Soviet policies. (See *infra*, pp. 96-98, 100-01.)

The objectives component is satisfied if an accused organization "operates primarily to advance the objectives of such world Communist movement as referred to in section 2." Section 2 contains lengthy Congressional findings concerning the existence and character of "a world Communist movement." But neither this section nor any other provision of the Act defines the "objectives" of the movement. These can only be inferred from sections 2(2) and 2(6). The former recites that it is the "purpose" of the movement "by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, terrorism and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world." Section 2(6) states that Communist-action organizations in various countries "endeavor to carry out the objective of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing totalitarian dictatorship."

It may be that the "objectives" referred to in section 3(3) are the "purpose" or "objective," stated in sections 2(2) and 2(6), of establishing a "Communist totalitarian dictatorship," without regard to the means employed to

that end. But Congress has no power to suppress a peaceful change in our form of government, no matter how obnoxious it believes the change would be. Hence Congress may not curtail the advocacy and association of those who promote such a change. "If, in the long run, the beliefs established in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." Holmes, J., dissenting, *Gitlow* v. *New York*, 268 U. S. 652, 673.

The situation is not remedied by the other possible interpretation of the objectives component—namely, that the objectives referred to include not merely the ultimate aim of establishing a Communist totalitarian dictatorship, but also the means for achieving that aim described in section 2. For sections 2(2) and 2(6) do not find that the world Communist movement presently advocates or employs force or other unlawful means. They merely find that the movement will resort to such means if necessary in an unstated eventuality. Hence the objectives component of section 3(3) is satisfied by nothing more than willingness to use illegal means in some undefined future contingency. Such willingness, unaccompanied by incitement to or preparation for violence, is neither a clear nor a present danger to the national security. In fact, *Yates* v. *United States*, 354 U. S. 298, 324, doubted whether an actual conspiracy "to engage at some future time in seditious advocacy" could constitutionally be punished.

If the objectives component could be construed to require the present use of or incitement to illegal means, then the clear and present danger test might be satisfied. Such a construction would be an imaginative rendition unsupported by the statutory text. But if adopted, it would condemn the application of the Act by the Board and the court below. Neither the Board nor the court found, or could have found on the evidence, that petitioner engages

in or incites to violence or other unlawful methods. The Board did find that petitioner "advocates the overthrow of the government of the United States by force and violence *if necessary*" (R. 2633, emphasis supplied, and see R. 2632). On its face this is a finding not of incitement but of advocacy of abstract doctrine, which cannot constitutionally be suppressed. Cf. *Yates* v. *United States, supra.* Furthermore, as appears from the Modified Report (R. 2632-33), the finding was based on Marxist texts and the conclusory testimony of government witnesses. *Yates* held (at 329) that the same texts and similar testimony did not establish "Party advocacy or teaching in the sense of a call to forcible action at some future time."

Section 13(e) of the Act further demonstrates that a registration order may be issued without a finding of acts or advocacy prejudicial to the national security. None of the criteria which the section directs the Board to consider includes the use or advocacy of violence or other unlawful means. The section focuses on the promotion of or agreement with any Soviet views, no matter how valid or innocuous. The court below acknowledged (Ops. 44) that the "directives and policies" criterion of section 13(e)(1) does not require a showing that petitioner's objectives are evil or morally wrong, much less that they are criminal or violent. It further acknowledged (Ops. 45) that the "nondeviation" criterion of section 13(e)(2) may be satisfied by evidence of adherence to policies calculated to promote the peace and welfare of our nation. And in fact the Board and the court below so applied these criteria, as when they placed heavy reliance on the fact that petitioner and the Soviet Union held similar views on a variety of international issues (see *infra*, pp. 111-17).

Accordingly, if the judgment below is sustained, petitioner will be outlawed not for endangering the national security, but for peaceable advocacy of Marxism-Leninism and agreement with Soviet views on international affairs.

If the registration order against petitioner is upheld, there will remain no effective limitations on Congress' control over political expression and association. If Congress can impose sanctions for "non-deviation" from Soviet views, it can do the same for "non-deviation" from other views. In fact, the provisions of the Act relating to front and infiltrated organizations already penalize agreement with petitioner's views. See secs. 13(f)(4) and 13A(e)(3).[14]

C. The Act Is Not Limited to the Control of Conduct Endangering the National Security But Suppresses Peaceable Advocacy and Assembly.

The Act violates the First Amendment even if construed to authorize the issuance of a registration order only against organizations found to be engaged in acts or advocacy creating a clear and present danger to the national security. For in those instances where the legislature may constitutionally restrict speech, press, or assembly to prevent a substantive evil, the restriction is nevertheless invalid if it

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[14] The first petition filed under the Act by the Attorney General against a trade union alleges that it is Communist-infiltrated on the grounds, among others, that it has promoted the objectives of the Communist Party by: opposing the Smith Act, the Foreign Agents Registration Act, the Taft-Hartley Act, the Communist Control Act, the Selective Service Act, the Draft Extension Act, and the Defense Production Act; denouncing Congressional Committees and other government bodies for investigating un-American and subversive activities; denouncing government law-enforcement agencies, including the Federal Bureau of Investigation and the Immigration and Naturalization Service; opposing the registration and deportation of aliens and the federal employee loyalty program; supporting and urging its members to support the Progressive Party; advocating clemency for Julius and Ethel Rosenberg, the "Trenton Six," Willie McGee and the "Martinsville Seven"; charging the United States government with the practice of genocide; and denouncing American statesmen and industrialists as "warmongers." Petition in *Rogers v. International Union of Mine, Mill and Smelter Workers*, Docket No. 116-56, Subversive Activities Control Board.

is broader than necessary for prevention of the evil. *De Jonge* v. *Oregon*, 299 U. S. 353; *Stromberg* v. *California*, 283 U. S. 359; *Cantwell* v. *Connecticut*, 310 U. S. 296, 308; *Winters* v. *New York*, 333 U. S. 507. As stated in *De Jonge*, at 364-65:

> "These [First Amendment] rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed."

Contrary to this principle, the Act's restraints are not limited to speech, press and assembly when used to incite to terrorism, sabotage, violence and the other unlawful conduct which section 2 attributes to the world Communist movement. Instead, by outlawing petitioner, the Act and the registration order proscribe all of petitioner's activities, including its admittedly extensive peaceable advocacy and assembly.

Although always numerically small, petitioner has run numerous candidates for public office, some of whom were elected, and has participated in coalitions supporting non-Communist candidates. Even its worst enemies admit that it has frequently played a seminal role in bringing about needed changes in our social and economic life. Many of the reforms advanced by petitioner and originally the object of vilification, have been adopted by the people of the United States, when they were convinced, with the aid of petitioner's agitation, that these were to their best interest. These include social security, minimum wage legislation, the organization of labor unions on industrial lines and measures against racial discrimination. Like other political parties it seeks to help organize "the expression of bloc sentiment" which "is and always has been an integral part of our democratic and electoral process." *United States* v. *C. I. O.*, 335 U. S. 106, 143.

Indeed, it is precisely peaceable advocacy and innocent association which the Act is designed to reach, since there is a plethora of other laws which punish seditious acts and advocacy and provide for the registration of foreign agents. E.g., 18 U. S. C. 793-798, 951, 957, 2151-2157, 2381-2391; 22 U. S. C. 611-621. Because the Act suppresses all the advocacy and political activity of petitioner and is not limited to, and is unnecessary for, suppressing illegitimate and dangerous conduct, it is invalid.

At the heart of the First Amendment is the principle that government may not intervene in the political process by imposing special disabilities on any political group. Otherwise the party in power could perpetuate itself in office by denying its rivals free and equal access to the electorate. The Act clearly infringes this principle. For it discriminatorily prevents petitioner from engaging in political activities of a kind employed by other political parties and groups in their effort to attract adherents. As the President said in a special message to Congress, the bill which became the Act "would, in effect, impose severe penalties for normal political activities on the part of certain groups, including Communists and Communist Party-line followers," and attempts to "proscribe for groups such as the Communists, certain activities that are perfectly proper for everyone else." H.R. Doc. 679, 81st Cong., 2d Sess., p. 6.

The constitutional principles discussed above have been applied by the Court specifically to the Communist Party and its members. *De Jonge* v. *Oregon*, 299 U. S. 353, and *Herndon* v. *Lowry*, 301 U. S. 242, held that peaceable assembly and advocacy of the Communist Party and its members could not be abridged even if it were assumed that the Party engaged in illicit advocacy and activity.

Similarly, *American Communications Association* v. *Douds*, 339 U. S. 382, sustained section 9(h) of the Taft-Hartley Act only because it "did not restrain the activities

of the Communist Party as a political organization" (at 404), or proscribe or severely burden Party membership (at 404, 434). The Act does the very things condemned by *Douds*.

Douds justified section 9(h) on the ground that it was narrowly limited to the prevention of what Congress found to be a substantive injury to interstate commerce. The Court's approval of what it considered an incidental infringement of the rights of a few Communists rested on the view that Congress had acted economically to attain a constitutionally permitted objective.

In sharp contrast, the Act suppresses all advocacy of and association with petitioner and its members. The Act's abridgment of the First Amendment rights of Communists is not incidental to some other and legitimate legislative objective. It is an end in itself, its only other purpose being to lay a foundation for the abridgment of the constitutional liberties of non-Communists.

In *Australian Communist Party* v. *The Commonwealth*, 83 C. L. R. 1 (1951), the High Court of Australia applied the same principle of legislative economy in a different constitutional setting. It invalidated a statute which dissolved the Communist Party, authorized the executive to dissolve other organizations found to be under Communist influence or control, and imposed civil disabilities on Communist Party members. The statute contained a recital of parliamentary findings concerning Communism similar to those of section 2 of the Act. The Commonwealth urged that the law was authorized under the defense power vested in the federal government by the Australian constitution. The High Court rejected this contention on the grounds that the statutory sanctions exceeded measures reasonably necessary for defense purposes and unnecessarily suppressed civil liberties. As one of the prevailing opinions stated (at 225-27):

> "Any conduct which is reasonably capable of delaying or otherwise being prejudicial to the Commonwealth preparing for war would be conduct which could be prevented or prohibited or regulated under the defense power. Amongst such conduct there could be included, I should think, most if not all, of the serious misdoings with which communist bodies and communists are charged in the recitals. But the legislation would have to define the nature of the conduct and the means adopted to combat it, so that the court would be in a position to judge whether it was reasonably necessary to legislate with respect to such conduct in the interests of defense and whether such means were reasonably appropriate to the purpose * * *. But none of this conduct is prevented or prohibited or made an offense by the operative provisions of the Act * * * In my opinion legislation to wind up bodies corporate or unincorporate and to dispose of their assets or to deprive individuals of their civil rights or liberties on the mere assertion of Parliament or the Executive that they are conducting themselves in a manner prejudicial to security and defense, is not authorized by the defense power or the incidental power in peace time."

And as another one of the Justices put it (at 187-88):

> "In point of constitutional theory the power to legislate for the protection of an existing form of government ought not to be based upon a conception, if otherwise adequate, adequate only to assist those holding power to resist or suppress obstruction or opposition or attempts to displace them or the forms of government they defend."

The First Amendment requirement of narrowly drawn legislation is violated not only by the Act as a whole, but by each of its major sanctions when considered individually.

Under section 10, an organization ordered to register must label its publications and broadcasts as emanating from a Communist organization and hence as the product

of a group that has been officially condemned as a seditious foreign agent. Obviously these requirements effectively restrain freedom of press and expression. Cf. *Talley* v. *California, supra.* They cannot be justified as safeguards against incitement since they apply regardless of the content of the publications and broadcasts.

The court below analogized section 10 to mail fraud statutes (Ops. 35-36). The analogy is faulty because the restraints of the latter are based on the content of the mail, not on the character of the sender or recipient. The power to prevent fraudulent communications cannot be employed to bar innocent publications. *Donaldson* v. *Read Magazine*, 333 U. S. 178, 191-92, sustained a postoffice fraud order against a First Amendment attack only because the order was limited to communications relating to the particular fraudulent scheme, leaving other communications of the offending publication untouched. Similarly, the Postmaster General may not ban future issues of a magazine from the mails because past issues contained obscene matter. *Summerfield* v. *Sunshine Book Company*, 221 F. 2d 42, cert. den. 349 U. S. 921. Section 10, however, restrains all the literature and broadcasts of the organization even without regard to the content of prior expressions.

The section cannot be analogized to the Congressional power to exclude fraudulent matter from the mails for the additional reason that the power does not and cannot constitutionally apply to matters of opinion. *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Reilly* v. *Pinkus*, 338 U. S. 269. The present case presents an even stronger claim to First Amendment protection since it involves opinion on political questions.

The court below also defended section 10 by citing the labelling provisions of the Foreign Agents Registration Act (Ops. 36). The controls of that statute, as construed in *Viereck* v. *United States*, 318 U. S. 236, are limited to activities conducted by the agent on behalf of his foreign

principal. Furthermore, the label required by that statute is not an invidious one. Section 10 of the Act, however, requires communications to be labelled as emanating from a seditious foreign agent even though they are made in the organization's own behalf and are innocent of seditious content.

The court below also compared section 10 to statutes requiring that paid broadcasts be identified by the name of the purchaser and that literature in behalf of candidates for federal office bear the name of the issuer (Ops. 36). These provisions, however, are non-invidious and non-discriminatory, and hence do not discourage the exercise of First Amendment rights. The failure of the court below to appreciate the difference between such requirements and the provisions of section 10 is indicated by its statement (Ops. 35-36) that petitioner has little to choose between identifying itself as "the Communist Party" and as "a Communist organization." Of course petitioner does not object to identifying itself by name, which it does voluntarily in the conduct of its activities as well as pursuant to statutes of the kind referred to by the Court. This is entirely different, however, from the discriminatory requirement of section 10 that it identify itself with a label or armband signifying that it has been governmentally condemned as a seditious foreign agent. The function of section 10 is not to identify petitioner, but to deprive it of an audience and to deny others access to its ideas.

Similarly, the Act's sanctions on petitioner's members are not designed to control unlawful or seditious conduct but flagrantly abridge the First Amendment's guaranty of freedom of association. This appears from our subsequent demonstration that the sanctions likewise violate the less stringent guaranty of due process (see *infra*, pp. 50-56).

D. The Act Imposes a Prior Restraint on the Exercise of First Amendment Rights.

As we have already shown (*supra*, pp. 26-28), the registration requirement is an integral part of an invalid statutory scheme to outlaw organizations. But even if the registration provision is considered by itself, divorced from the sanctions of the Act, it is unconstitutional as a prior restraint on the exercise of First Amendment rights.

The Act and the order require petitioner to register as a participant in the international conspiracy described in section 2 before it can have a lawful existence, and thus before it can lawfully exercise any First Amendment rights. *Thomas* v. *Collins*, 323 U. S. 516, establishes, however, that the exercise of speech and assembly may not be conditioned on prior registration with governmental authorities. There the Court stated (at 539):

> "If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order."

The prior restraint invalidated by *Thomas* v. *Collins* was far less onerous than that imposed by the Act. The statute in that case merely required registration of the name and union affiliation of labor organizers desiring to solicit union membership. The registration did not, as here, involve an opprobrious characterization, or require identification of the union's members for subjection to intolerable statutory sanctions.

United States v. *Harriss*, 347 U. S. 612, upheld the statute requiring registration of lobbyists, only after limiting it to persons who collect or receive contributions for the purpose of influencing, and whose main purpose it is to in-

fluence, legislation by direct communication with members of Congress. As so limited, the Court held the statute valid because:

> "It has merely provided for a modicum of information from those who *for hire* attempt to influence legislation or who *collect or spend funds* for that purpose. It only wants to know who is being hired, who is putting up the money, and how much." (At 625, emphasis added.)

The statute thus construed is within the principle recognized in *Thomas* v. *Collins* (at 538) that a reasonable identification or registration requirement may be imposed on one who solicits funds. See also *N. A. A. C. P.* v. *Alabama, supra,* at 464. Furthermore, as *Harriss* plainly indicates, a registration requirement even under these circumstances would be of doubtful validity if it applied to persons who seek to influence legislation by propagandizing the general public. Cf. *United States* v. *Rumely,* 345 U. S. 41. The Act has neither of the saving graces of the Lobbying Act. Registration of Communist organizations is not made dependent on the collection of funds and is a precondition to every form of speech, writing and assembly, irrespective of purpose and without regard to the class of persons sought to be influenced.

This Court has never passed upon the constitutionality of the Foreign Agents Registration Act, 22 U. S. C. 611-621, which, in at least some of its applications, is a regulation of commercial or professional relations between foreign agents and their principals. Moreover, it is significant that the one decision of the Court under that act reversed a conviction on the ground that the statute had not been narrowly construed and applied by the trial court. *Viereck* v. *United States,* 318 U. S. 236, discussed *supra,* pp. 38-39).

Finally, the registrations under the Lobbying and Foreign Agents Registration Acts require only "a modicum of information," involve no self-defamation by the regis-

trants, and do not result in any significant inhibition of First Amendment rights.

The prior restraint imposed by the Act's requirement of registration is made more onerous by the provision that the registrant list the names of all its members (sec. 7(d)(4)). This public identification obviously is a major inhibition on the members' freedom of association. "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *N. A. A. C. P.* v. *Alabama, supra,* at 462; *Bates* v. *Little Rock,* 361 U. S. 516.[15] Anonymity of membership in minority parties is indispensable to freedom of political action. Almost every minority party which advocated substantial change has been the object of bitter attack and public vituperation. See *Talley* v. *California, supra,* at 64-65. Most of them would have been strangled in infancy if they had been required to reveal the names of their members. To permit this handicap to be imposed on a minority party by a legislature composed of its political opponents is to destroy the electoral process.

Accordingly, the Act's requirement that petitioner register and publicly list the names of its members is invalid as a prior restraint on First Amendment freedoms even without regard to the fact that the listing also identifies the members as the objects of the onerous sanctions imposed by the Act.

This conclusion is not vitiated by *New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, which upheld, as applied to a member of the Ku Klux Klan, a New York statute requiring oath-bound organizations to file their

[15] It would seem superfluous to insist on evidence that known or suspected Communists are targets for discrimination and invidium. The record, however, contains such evidence. E.g., R. 1217-23. See also the discussion by the court below of the purpose of "secret practices" (Ops. 73-74).

membership rosters with state officials. "The decision was based on the particular character of the Klan's activities, involving acts of unlawful intimidation and violence, which the Court assumed was before the state legislature when it enacted the statute, and of which the Court itself took judicial notice." *N. A. A. C. P.* v. *Alabama, supra,* at 465.

Here the registration order was issued, pursuant to the Act, without a finding or evidence that petitioner engages in or incites to violence or other unlawful conduct. Judicial notice cannot substitute for such evidence. The Court held in *Yates* v. *United States, supra,* at 329-30, that the government had been unable to prove in a protracted trial that petitioner engages in incitement to violence.

Furthermore, the statute in *Bryant* v. *Zimmerman* was not challenged as a restraint on speech, press or assembly and the Court did not consider that question. The Court took judicial notice of the Klan's nature and activities only to support its holding that the statute did not arbitrarily classify organizations contrary to the equal protection clause of the Fourteenth Amendment.

If tested by First Amendment principles, *Bryant* v. *Zimmerman* is wrong. Since the statute there involved was not limited to the control of acts of violence and intimidation, it restrained membership in the Klan for peaceable purposes and thus offended the First Amendment requirement of legislative economy. See *supra;* pp. 33-34. Since the statute did not require proof that the Klan engaged in violence or intimidation, it violated the principle that association may be restrained only to guard against the danger of a substantive evil. Neither legislative findings nor judicial notice can substitute for proof of a fact whose existence is a constitutional prerequisite for legislation. See *supra,* p. 29, ftn. 13. Finally, *Bryant* has the fundamental vice that it places freedom of association at the mercy of findings which the persons affected have had no opportunity to contest. See Robison, *Protection of As-*

sociations From Compulsory Disclosure of Membership, 58 Col. L. Rev. 614, 642-47.

The Act also requires that the registration statement list all printing presses, mimeograph machines and the like in the possession of the registrant, its officers or members, or other groups in which if "has an interest" (sec. 7 (d) (6), added by 68 Stat. 586). This restraint adopts the odious premise that printing presses may be regulated like guns, and patently violates the First Amendment.

II. The Act violates the privilege against self-incrimination.

The registration of a Communist-action organization must, of course, be accomplished by individuals. Under the Act and the Attorney General's regulations, the persons required to sign and file the registration forms for the organization are its principal officers and all the members of its governing board. Act, secs. 7(d) and (h); 28 C. F. R. 11.200, 11.205; Dept. of Justice Form ISA-1. If the organization does not register, or if its registration statement omits the names of any members, the members must register themselves (sec. 8). Failure of the officers to register the organization or of individual members to register themselves when and as required is punishable by penalties which accumulate at the rate of five years imprisonment and $10,000 for each day that the failure continues (sec. 15).

It is obvious that any person who signed petitioner's registration statement as an officer of the organization and gave the information required by section 7 would thereby admit his membership in the Communist Party and an "intimate knowledge of its workings." *Blau v. United States*, 340 U. S. 159, 161. He would necessarily, therefore, furnish "a link in the chain of evidence needed

in a prosecution" (*ibid.*) of himself under section 4(a) of the Act, as well as under the Smith Act.[16] The same thing is true of an individual member who registers himself.

The Court has held, however, that a compelled admission of membership in the Communist Party, without more, violates the privilege against self-incrimination. *Blau* v. *United States, supra; Quinn* v. *United States*, 349 U. S. 155. The Act and the registration order, therefore, invade the Fifth Amendment privilege of petitioner's officers and members. Petitioner has standing to raise this issue as the representative of its officers and members. *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449.

In an effort to avoid the unconstitutionality of compelling self-incrimination by the device of registration, the Act contains a so-called "immunity" provision. Section 4(f) provides that the holding of office or membership in a Communist organization shall not, per se, constitute a violation of section 4(a) or any other criminal law, and that the fact of registration of any person under sections 7 and 8 shall not be admissible in a prosecution under section 4(a) or for any other crime.

This provision tacitly recognizes the vulnerability of the Act, but does not save it because the immunity conferred is not coextensive with the constitutional privilege. Section 4(f) merely immunizes membership per se and makes the fact of registration inadmissible as evidence. This does not prevent prosecution of a registrant for an offense in which his membership in the Communist Party is one of several ingredients. Nor does it bar the prosecution from proving the membership of an accused by evidence other than the registration statement, even if the registration statement supplied the lead to such other evidence. Accordingly, the provision does not afford a regis-

[16] Registration also serves to identify the registrants for apprehension under the concentration camp provisions of Title II of the Internal Security Act, 50 U. S. C. 811-26.

trant "complete immunity from prosecution for any act concerning which he testifies;" and therefore it is "not a sufficient substitute for the constitutional privilege of refusing to answer self-incriminating questions." *United States* v. *Bryan*, 339 U. S. 323, 336; *Counselman* v. *Hitchcock*, 142 U. S. 547.

The majority below held (1) that the Act and the registration order did not violate the privilege of petitioner's officers against self-incrimination, and (2) that in any event it was premature to raise the issue in this proceeding. The majority was wrong, and Judge Bazelon's dissent holding the Act unconstitutional was correct.

1. The majority below held that under *United States* v. *White*, 322 U. S. 694, petitioner's officers are not privileged to refuse to register the organization. This holding is unsound in three respects.

First, *White* held that the privilege does not excuse an officer from producing records of the organization on the grounds that the *contents* of the records will incriminate him. Here the officer incriminates himself not by the contents of the records, but by his acts in signing and filing the registration statement. Thereby he identifies himself as a member and officer of petitioner and as one familiar with its records and affairs. These admissions are precisely those which *Blau* v. *United States*, *supra*, held cannot be compelled.

Second, the Act does not call for production of the organization's records. Instead it requires the officers to prepare and file original statements. Hence, the *White* doctrine does not apply. *White* itself pointed out (at 701) that its rule was not meant to infringe the individual's privilege against "compulsory incrimination through his own testimony." The same distinction was made in *Shapiro* v. *United States*, 335 U. S. 1, 27, and *Wilson* v. *United States*, 221 U. S. 361, 377, 385. Most recently *Curcio* v. *United States*, 354 U. S. 118, made it clear that the privilege

protects the officer from compulsion to do more than to produce and identify the records. He may not otherwise be compelled to testify about them. In *Curcio* an officer was held privileged not to reveal the whereabouts of records; *a fortiori* he may not be compelled to give information as to their contents. *Curcio* stated (at 128):

> "The compulsory production of corporate or association records by their custodian is readily justifiable, even though the custodian protests against it for personal reasons, because he does not own the records and has no legally cognizable interest in them. However, forcing the custodian to testify orally as to the whereabouts of nonproduced records requires him to disclose the contents of his own mind. He might be compelled to convict himself out of his own mouth. That is contrary to the spirit and letter of the Fifth Amendment."

Third, the *White* rule is inapplicable because section 7(d) compels the officers to furnish information about the organization which may not appear in its records.

> "The execution of a registration statement by an individual would at least require him to confirm and transpose selected material from the organization's records to the registration statement. Since an organization need not keep complete records prior to registration, in many cases the officer would be forced to execute the registration statement by relying on his own knowledge. It is clear that in both instances the officer is doing more than producing records and identifying them. He is disclosing other matters of his personal knowledge." (Note, *The Internal Security Act of 1950*, 51 Col. L. Rev. 606, 621, quoted in Judge Bazelon's dissent, Ops. 83.)

2. The majority below also held (Ops. 20-23) that adjudication of the officers' privilege is premature in this proceeding and must await a criminal prosecution for the failure of the officers to file a registration statement. The grounds for this conclusion were that the officers (a) may

never assert the privilege, (b) may have done something to waive the privilege, or (c) may be granted immunity under 18 U. S. C. 3486.

(a) The principle that the privilege is lost if not asserted is applicable where the person from whom incriminating information is demanded has an opportunity to claim the privilege before he is prosecuted for refusing to answer. If there is no opportunity to assert the privilege, it cannot be lost for non-assertion. Petitioner's officers have no such opportunity. If they submit a claim of privilege to the Attorney General as a reason for non-compliance with the registration requirement, they will thereby identify themselves as officers of petitioner and make the same incriminating admission that registration entails. If they do not claim the privilege they will be prosecuted for failure to file the registration statement. It follows that this proceeding provides the only opportunity to secure to the officers the benefit of the privilege. Hence the issue is not prematurely raised.

The situation is the same as in *N. A. A. C. P. v. Alabama, supra,* which held that an organization may assert the constitutional right of its members against compulsory disclosure of their membership. As the Court pointed out (at 459), "To require that it [the right] be claimed by the members themselves would result in nullification of the right at the very moment of its assertion."

The effect of the holding below is that legislation or administrative orders which compel incriminating testimony can never be declared unconstitutional but merely unenforceable in individual cases against persons who assert the privilege. This is contrary to *Boyd* v. *United States,* 116 U. S. 616. That case involved a statute which, like the Act, afforded the accused no meaningful opportunity to assert the privilege. Accordingly, the Court (at 638) held the statute "unconstitutional and void" without refer-

ence to the doctrine that the privilege must be asserted to be availed of.[17]

(b) The majority below also suggested (Ops. 22) that petitioner's officers may not be entitled to the privilege because some of them were convicted of conspiring to violate the Smith Act, some have publicly asserted their membership, and two identified themselves as officers in testifying before the Board. This suggestion is based on the unwarranted assumption that the persons referred to by the Court will be petitioner's officers at the time registration is required. Even if they are, it is obvious that none of the factors alluded to by the court will strip them of their privilege. The conviction of some under the Smith Act is no bar to other indictments for subsequent or different offenses under the same statute,[18] or under section 4(a) of the Act, or other criminal statutes. The facts that some of the officers have made extra-judicial admissions and that two of them testified about their offices before the Board do not constitute waivers of the privilege with respect to the registration statement. For it is settled that admissions made extra-judicially, in another proceeding, or even at different stages of the same proceeding, do not waive the privilege. *Re Neff*, 206 F. 2d 149, and cases cited therein at 152; *United States* v. *Field*, 193 F. 2d 109; 8 Wigmore, *Evidence* (3rd Ed.), sec. 2276(4). In any event the suggestion that some

[17] Similarly, state courts have invalidated state statutes compelling self-incrimination on their face. *In re DeWar*, 148 Atl. 489 (Vt.); *People* v. *Reardon*, 90 N. E. 829 (N. Y.); *State* v. *Simmons Hardware Co.*, 18 S. W. 1125 (Mo.); *People* v. *McCormick*, 228 P. 2d 349 (Calif.); *Maryland* v. *Perdew*, 19 U. S. L. Week 2357 (Md. C. C., Alleghany Cty.). The last two cases involved statutes requiring Communist Party members to register.

[18] In fact, defendants convicted in *Dennis* v. *United States*, 341 U. S. 494, are also under pending indictments for violating the membership provision of the Smith Act, 18 U. S. C. 2385.

of the officers may have waived the privilege obviously cannot apply to other officers as to whom no waiver is claimed.

(c) Finally, the majority below suggested (Ops. 22-23) the possibility that the Attorney General might meet the officers' claim of privilege by granting them immunity under 18 U. S. C. 3486. The proposition is untenable. The immunity statute has no application to the filing of registration statements under the Act. It applies only in proceedings before Congressional committees, federal grand juries, and federal courts.

For these reasons, the court below erred in holding that the privilege of the officers against self-incrimination could not be asserted by petitioner in this proceeding. The court also erred in holding that petitioner could not assert the privilege of its members. It reasoned (Ops. 24-25) that the problem of the members' privilege was not posed in this case and would arise only when a member was ordered to register following failure of petitioner to list his name in its registration statement. This overlooks the fact that if petitioner lists its members, it thereby incriminates them. Yet petitioner "and its members are in every practical sense identical" (*N.A.A.C.P.* v. *Alabama, supra,* at 459). Therefore, when the members are incriminated by petitioner, they are being incriminated by themselves. Accordingly, as held in *N.A.A.C.P.* v. *Alabama,* an organization may raise its members' constitutional objections to a demand to disclose their identity when the demand is made on it.

III. The Act deprives petitioner's members of liberty and property without due process of law.

As we have seen (*supra,* pp. 5-7, 26-27), a final regsitration order will result in intolerable sanctions on petitioner's members. Their names must be publicly listed on an

opprobrious registration statement, either by the organization or themselves. They are barred from extensive areas of employment, public and private. They are denied the right to travel abroad. Naturalized members may lose their citizenship. Alien members must be deported.

The rights, privileges, and interest in reputation of which the members are deprived clearly constitute "liberty and property," protected by the due process clause.[19] Petitioner has standing to challenge the deprivation of these rights both because it is the appropriate representative of its members and because the disabilities imposed on its members directly affect and injure petitioner by tending to reduce its membership and revenue. *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 152-154, 187.

The members suffer the onerous sanctions of the Act even though they are never determined to be under foreign control or engaged in advancing the objectives attributed to the world Communist movement by section 2. It does not matter that they have no knowledge of the alleged character of petitioner. Nor are they afforded an opportunity to demonstrate that despite their membership they are fit persons to enjoy the privileges denied them. The Act thus goes far beyond the much-criticized government loyalty-security program. Under the latter, organizational membership is not a conclusive disqualification, but "is simply one piece of evidence which may or may not be helpful in arriving at a conclusion as to the action which is to be taken in a particular case." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, *supra*, at 205; see *Kutcher* v. *Gray*, 199

[19] *Williams* v. *Fears*, 179 U. S. 270, 274; *Truax* v. *Raich*, 239 U. S. 33, 41; *Wieman* v. *Updegraff*, 344 U. S. 183; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123; *Kent* v. *Dulles*, 357 U. S. 116, 125; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 238-239.

F. 2d 783. The Act, therefore, represents an extreme case of defaming individuals and subjecting them to disabilities solely and conclusively because of their association. In these respects it violates the due process principles established by *Wieman* v. *Updegraff*, 344 U. S. 183, and *Adler* v. *Board of Education*, 342 U. S. 485.[20]

Wieman held that exclusion even from public employment cannot be constitutionally imposed for organizational membership in the absence of knowledge by the member of the organization's illicit character. The Court stated (at 191), "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power." *Adler* ruled that an individual could not be barred from teaching in the public schools even for knowing membership in a seditious organization unless he had an opportunity to prove that notwithstanding his membership he was fit to be a school teacher. The Court stated (at 495) that the statute involved was valid because the presumption of ineligibility arising from knowing membership "is not conclusive but arises only in a hearing where the person against whom it may arise has the full opportunity to rebut it." The Court added (at 496, emphasis supplied):

> "Where, as here, the relation between the fact found and the presumption is clear and direct *and is not conclusive*, the requirements of due process are satisfied."

Clearly, the protections accorded by *Weiman* and *Adler* to the individual's interest in government employment also apply to his interest in private employment and in the opportunity for foreign travel. *Schware* v. *Board of Bar Examiners*, *supra*, at 246; cf. *Greene* v. *McElroy*, 360 U. S. 474; *Kent* v. *Dulles*, *supra*.

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[20] It also violates the First Amendment in this regard. See *Smith* v. *California*, 361 U. S. 147, 151-52.

Since the Act does not require scienter for the application of its sanctions against members, it is condemned by *Wieman*. Since it makes conclusive a presumption of unfitness arising from membership, it is condemned by *Adler*.

The court below held that the scienter requirement of *Wieman* was satisfied on the grounds that (1) a member has knowledge of his membership; and (2), "The statute before us requires that before these sanctions apply a member must have 'knowledge or notice' that the organization has registered or been finally ordered to register" (Ops. 26). These grounds are both irrelevant and inaccurate.

As *Wieman* makes abundantly clear, the scienter required by due process is personal knowledge that the organization has deleterious purposes. The requirement is not satisfied by knowledge of membership. Nor is it satisfied by knowledge or notice that the organization has been governmentally condemned. This is so if only for the reason that the member was not a party to, and hence cannot be bound by, the proceeding against the organization. Moreover, knowledge that an organization has been found to have seditious or other evil purposes cannot be inferred from knowledge that it has been ordered to register. For the Act permits a registration order to be issued without proof of such purposes (see *supra*, pp. 28-32).

Furthermore, the court misread the statute in stating that knowledge or notice of a registration order is a prerequisite to the imposition of the sanctions. Under the Act, notice by publication [21] is necessary to support criminal prosecutions for applying for a forbidden job or a passport or for a member's failure to register himself if the

[21] Under section 14(k), notice of a registration order is given to members by publication in the Federal Register of the fact that the order has become final.

organization failed to list him (secs. 5(a), 6(a), 8(b), 15(a)(2)). But this limited "scienter" is not necessary to the imposition of the civil sanctions and disabilities of the Act. For employers must deny a member employment, the government must withhold a passport from him, and, if he is an alien, the government must deport him and may not naturalize him, all without reference to any kind of knowledge or notice on his part. (See secs. 6(b) and 5(a)(2) of the Act, and sections 241(a)(6)(E) and 313(a)(2) of the Immigration and Nationality Act.)

Finally, in view of the vague criteria of membership established by section 5 of the Communist Control Act, it is not true that "members" have knowledge of their membership. (See *infra*, pp. 89-93.)

The sanctions on the members are invalid not only under the rules laid down in *Wieman* and *Adler*, but because in still other respects they violate the due process principle that "the means selected shall have a real and substantial relation to the object sought to be obtained." *Nebbia* v. *New York*, 291 U. S. 502, 525.

The restrictions on employment in government and industry apply to all positions, including the most insentitive, and thus exceed any measures reasonably required for the protection of the national security. Cf. *Cole* v. *Young*, 351 U. S. 536. Nor can there be any foundation in reason for allowing the Secretary of Defense unfettered and unreviewable authority to designate any private enterprise as a "defense facility," and thereby to declare non-sensitive enterprises off-limits for petitioner's members.

The prohibition of trade-union employment is also too embracing. It would subject a member of petitioner to a five-year prison term and a $10,000 fine for the "crime" of holding a job as a janitor for a local of the Musicians Union. Yet *American Communications Association* v. *Douds*, 339 U. S. 382, 404, held section 9(h) of the Taft-

Hartley Act valid on the ground that it excluded Communists only from "position[s] of great power over the economy of the country."

Similarly, the passport sanction prohibits all foreign travel by petitioner's members, even if for the most innocuous of purposes.

Section 25 of the Act (carried forward in section 340(c) of the Immigration and Nationality Act) makes membership by a naturalized citizen, within five years after naturalization, in an organization ordered to register under the Act, prima facie evidence sufficient to authorize the revocation of his citizenship in a denaturalization proceeding. The Constitution, however, prohibits revocation of citizenship for mere association. Cf. *Schneiderman* v. *United States*, 320 U. S. 118; *Knauer* v. *United States*, 328 U. S. 654, 669; *Baumgartner* v. *United States*, 322 U. S. 665. These cases involved association at the time of naturalization. The Act presents an aggravated case, since it presumes fraudulent procurement of naturalization on the basis of association *after* naturalization.

The court below avoided a decision on the validity of the denaturalization sanction on the ground that the issue must await determination in a denaturalization proceeding under the section. However, the presence of this sanction in the Act causes immediate harm to petitioner by making membership in it prohibitive for naturalized citizens. The issue is therefore ripe for adjudication, and petitioner has standing in this proceeding to challenge the validity of the section on its face (see *supra*, p. 51).

Analysis of the individual sanctions thus confirms our demonstration that the purpose and effect of the Act as a whole is to outlaw petitioner by illegalizing membership in it. The function of the sanctions is not to protect the national security. Such protection, if needed, could have been provided by narrowly drawn legislation addressed to

that purpose. The Act's sanctions serve a different purpose—to make registration impossible, destroy petitioner, and deny its members their livelihood and liberties merely because of their membership.

IV. The Act violates due process because it predetermines facts essential to a finding that petitioner is a Communist-action organization.

Since the order of the Board deprives petitioner and its members of liberty and property, it may not constitutionally be entered without a hearing. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123; *Morgan* v. *United States*, 304 U. S. 1. If any of the elements requisite to a determination of liability are found legislatively, rather than by an independent adjudication of the facts, the due process requirement of a hearing has been denied. *Manley* v. *Georgia*, 279 U. S. 1; *Western and Atlantic Railroad* v. *Henderson*, 279 U. S. 639; *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79; *Tot* v. *United States*, 319 U. S. 463.

The Act violates this requirement in three respects.

1. Under the Act, certain facts essential to guilt have been found legislatively and as a matter of law are removed from administrative adjudication by the Board. These are the "facts" as to the existence, nature and objectives of the world Communist movement.

Section 3(3) defines a Communist-action organization as an organization which (a) is substantially controlled by the foreign power or organization "controlling the world Communist movement referred to in section 2" and (b) operates primarily to advance the objectives of the "world Communist movement as referred to in section 2." Accordingly, there can be a Communist-action organization in the United States only if there is a world Communist movement of the

character and with the objectives described in section 2. However, the existence, nature and objectives of the world Communist movement are not issues left to adjudication by the Board. Instead, these "facts" are found by Congress in section 2. The findings are then incorporated into section 3(3) in the form of assumptions of fact which the Board is not authorized to re-examine, but is required to accept as the foundation for its decision.

The correctness of these legislative findings regarding the world Communist movement is also assumed by the eight criteria which section 13(e) requires the Board to apply in deciding whether an accused organization is a Communist-action organization.[22]

Accordingly, the Act does not permit the Board to decide that there is no world Communist movement, or that if there is one it is not controlled by a foreign government or does not have the objectives and characteristics attributed to it by section 2. Moreover, even if the Act contemplated Board determination of these issues, the Board could not decide them in the negative without overruling the Congressional findings which are part of the definition and violating the standards which the Act requires it to apply.

The court below held that the section 2 "findings upon the existence and nature of a world Communist movement" are binding on the Board and the courts and that these

[22] Thus the first of the evidentiary standards of 13(e) is "the extent to which" an accused organization's "policies are formulated and its activities performed pursuant to directives or to effectuate the policies of the foreign government or foreign organization in which is vested, or under the domination or control of which is exercised, the direction and control of the world Communist movement, referred to in section 2.". All the remaining standards, except 13(e)(7), refer back to "such foreign government or foreign organization" or "such world Communist movement."

matters are not subject to adjudication (Ops. 55-56). It held, however, that this legislative predetermination was not a violation of due process for the reason that (Ops. 55):

> "The rule, as we understand it, is that, if it appears Congress has power over the subject matter of a statute, and if the findings of fact are not baseless but are based on extensive investigation, the courts are to adopt these findings."

The rule on which the court relied is inapplicable. The rule applies only to findings of "legislative" as distinguished from "adjudicative" facts. Legislative facts are found by Congress for the purpose of showing the necessity and policy of a particular law. Such findings can be attacked for purposes of judicial review of the validity of the law only by showing that they have no reasonable basis. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152-154. Adjudicative facts, on the other hand, are those which bring a specific organization or person within the terms of the legislation enacted. As previously stated, due process requires that the organization or person have an opportunity to litigate those facts.

Clearly, the existence, objectives and nature of the world Communist movement are adjudicative facts, since they are prerequisites to bringing an organization under the coverage of the Act.[23]

Petitioner has been ordered to register as a "Communist-action organization." The first component of the definition of such an organization is that it is the agent of the foreign government or foreign organization which controls "the world Communist movement referred to in

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[23] The findings of section 2 are legislative facts for the purpose of aiding determination of the reasonableness and policy of the Act. But under the 3(3) definition, they are adjudicative facts for the purpose of determining whether an accused organization is a Communist-action organization.

section 2." The fact of such agency is obviously an adjudicative or operative fact as the court below itself recognized (Ops. 41). Hence due process requires that petitioner be allowed to litigate the existence of this fact. But agency cannot exist without a principal. Therefore, due process requires that the petitioner be allowed to prove that there is no agency by showing that there is no principal—i.e., that there is no world Communist movement as described in section 2, and that consequently there is no foreign government or organization which controls that movement and can be the alleged principal.

The second half of the definition of a Communist-action organization is that it "operates primarily to advance the objectives of such world Communist movement as referred to in section 2". Due process requires that petitioner be allowed to litigate the adjudicative or operative fact of whether it operates to advance the described objectives. This means that petitioner must be allowed to prove that it does not so operate because (a) there is no such world Communist movement, and hence there can be no such objectives; or (b) if there is a world Communist movement, it does not have the objectives ascribed to it, and hence petitioner can not operate to advance them.

Section 2, however, precludes petitioner from litigating any of the foregoing adjudicative facts. In short, petitioner has been ordered to register and label its publications and broadcasts as the agent of a described foreign principal, without being allowed to prove the non-existence of this principal. It has been ordered to register and label as an organization which advances specified seditious objectives of a foreign movement, without being allowed to prove that the movement does not exist or does not have those objectives. Petitioner has, therefore, been foreclosed by legislative fiat from litigating adjudicative facts. This is a palpable violation of due process.

Nor can this result be obviated by construing the statute, contrary to its terms, as authorizing the Board to determine whether there is a world Communist movement of the nature found by section 2. For the Board could not adjudicate these issues fairly and impartially. An administrative agency cannot realistically be expected to decide that Congressional findings are untrue. This is particularly so when, as here, the findings furnish the justification for the enactment of the legislation and the establishment of the agency, and are prefaced by Congress' assertion that they were made "As a result of evidence adduced before various committees of the Senate and House of Representatives." Indeed, it would be fatuous to ascribe to Congress the intention that the Board should reexamine and redetermine the identical issues on which Congress made its findings.

2. Section 2 also predetermines the issue as to the existence of a Communist-action organization in the United States. Sections 2(5) and 2(6) find that the foreign Communist dictatorship establishes and utilizes Communist-action organizations in various countries. Section 2(12) finds that there is a foreign-controlled "Communist network in the United States." Section 2(15) finds that "the Communist movement in the United States" is an organization, and that "*the* Communist organization in the United States" (emphasis added) endangers the nation's security. Section 2(9) refers to individuals in the United States who participate in the world Communist movement (which, by hypothesis, operates through Communist-action organizations). Collectively, these findings constitute a finding that there is a Communist-action organization in the United States.

Unlike the predetermination with regard to a world Communist movement, the legislative finding of a domestic Communist-action organization is not expressly incorporated into the section 3(3) definition and the standards of

section 13(c). Hence the latter issue is ostensibly open for administrative determination. But as already shown, the difference is not significant, since the Board is not free to make findings of fact contrary to those made by Congress.

3. Congress, then, found that there *is* a Communist organization in the United States, that it *is* the agent and operates to carry out the seditious objectives of a destructive world Communist movement, which *is* controlled by a foreign power. Obviously, therefore, Congress left only one function for the Board—to supply the name of the particular organization which Congress had in mind when it referred in section 2(15) to "the Communist organization in the United States."

As to this there can be no earthly doubt. Petitioner denies the truth of the findings of section 2. But it is beyond question that by these findings Congress referred to, and meant, the Communist Party of the United States, the petitioner here. Indeed, as we later show, only qualms as to constitutionality kept Congress from identifying the petitioner by name. The evidence adduced before various committees of Congress, on which the findings purport to rest, dealt with petitioner by name; the legislation was recommended as a weapon against petitioner by name; and the reports and debates dealt with petitioner by name (*infra*, (pp. 67-71). Moreover, section 2(15) of the Act refers to a *single* "Communist organization in the United States," and if the petitioner is not the organization meant by Congress, it is obvious that there is none which can possibly be identified as such.

If after all this there could remain any lingering doubt that Congress intended to and did identify the petitioner as the Communist-action organization in the United States, two further circumstances would dispel it. Section 2(15), in describing "the Communist organization in the United States," contains verbatim excerpts from Judge Hand's

description of petitioner in *United States* v. *Dennis*, 183 F. 2d 201, 212, 213. And the House and Senate reports accompanying the legislation advised Congress, in identical language, that petitioner is a Communist-action organization within the meaning of the section 3(3) definition. The reports stated:

> "There is incontrovertible evidence of the fact that the Communist Party of the United States is dominated by such totalitarian dictatorship and that it is one of the principal instrumentalities used by the world Communist movement in its ruthless and timeless endeavor to advance the world march of Communism." [24]

This Court flatly ruled in *Carlson* v. *Landon*, 342 U. S. 524, 535, 544, that section 2(15) of the Act in mentioning "the Communist movement in the United States" refers to the Communist Party of the United States.

Finally, while this case was pending in the court below on the first review and thus before the Board's final decision, Congress enacted the Communist Control Act, section 4 of which identifies petitioner by name as a Communist-action organization.

Accordingly, even the particularized identification of petitioner as the Communist-action organization in the United States was legislatively predetermined. The Board's only function was to rubber-stamp the Act's built-in verdict against petitioner, and the elaborate administrative hearing was a sham.

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[24] H. Rep. 2980, 81st Cong., 2d Sess., on H.R. 9490, pp. 1-2; S. Rep. 1358, 81st Cong., 1st Sess., on S. 2311, p. 5. The same passage appears in the House Committee Report on the Mundt-Nixon bill, the forerunner of the Act. H. Rep. 1844, 80th Cong., 2d Sess., on H.R. 5852, p. 3.

V. The Act is a bill of attainder and otherwise invalid because it imposes punishment without a judicial trial.

"A bill of attainder is a legislative Act which inflicts punishment without judicial trial." *Cummings* v. *Missouri*, 4 Wall. (71 U. S.) 277, 323. As stated in *United States* v. *Lovett*, 328 U. S. 303, 315, and repeated in *Garner* v. *Board of Public Works*, 341 U. S. 716, 722:

> "* * * legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."

The Act, as we have seen, determines petitioner's guilt by legislative fiat and identifies petitioner and its members as the objects of statutory sanctions. But even if it is assumed, arguendo, that the Board was free to make an independent determination, the Act denies petitioner a judicial trial and imposes sanctions on "easily ascertainable members of a group." For petitioner is accorded only an administrative hearing, not a judicial trial, and the Act imposes various sanctions on the organization identified by the registration order and on its members. Accordingly, if the registration order and the sanctions "inflict punishment", the Act meets the definition of a bill of attainder and is invalid under Art. I, sec. 9, cl. 3 of the Constitution. It also, in that event, violates Art. III, sec. 2, cl. 3 and the Fifth and Sixth Amendments.[25] Cf. *Flemming* v. *Nestor*, 363 U. S. 603; *Wong Wing* v. *United States*, 163 U. S. 228; *Lipke* v. *Lederer*, 259 U. S. 557.

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[25] Art. III, sec. 2, cl. 3 requires that the "trial of all crimes * * * shall be by jury," and shall be held in the State where committed. The Fifth Amendment requires a grand jury presentment or indictment "for a capital or otherwise infamous crime." The Sixth Amendment applies to "all criminal prosecutions." These provisions are relevant because a crime is, by definition, conduct which the state punishes.

Since *Cummings*, it has been clear that the imposition of civil disabilities may constitute punishment. Cummings stated (at 320): "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of deprivation determining this fact." See also *Garner* v. *Board of Public Works, supra*, at 722; *Ex Parte Garland*, 4 Wall. (71 U. S.) 333; *Dent* v. *West Virginia*, 129 U. S. 114; *United States* v. *Lovett, supra*. As stated in *Trop* v. *Dulles*, 356 U. S. 86, 95-96:

> "Each time a statute has been challenged as being in conflict with the constitutional prohibitions against bills of attainder and ex post facto laws, it has been necessary to determine whether a penal law was involved, because these provisions apply only to statutes imposing penalties. In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose. The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a non-penal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature."

The "evident purpose" and effect of the Act are the imposition of punishment, not the accomplishment of "some other legitimate government purpose." This appears in several respects.

1. As we have seen (*supra*, pp. 26-27), registration by the organization, or by the member if he is not listed by the organization, entails self-defamation, self-ostracism, self-incrimination, and identification of the registrant and his associates as objects of onerous statutory sanctions and

public invidium. Thus registration is as punitive as the pillory or the arm-band.

As a realistic matter, registration is impossible since it is incompatible with self-preservation. Yet the Act provides astronomically cumulative fines and prison sentences for non-compliance with the registration order which the Act has made it impossible to obey. This is simply a roundabout way of fining and imprisoning those to whom the registration order is addressed.

2. A statute designed to control deleterious conduct rather than to punish would be confined to prevention of such conduct in the future. A registration order, however, outlaws the organization and thus prohibits it from engaging in any future activity, however innocent and beneficial. It is therefore as obviously penal as execution of an individual.

3. The Act's self-justification, stated in section 2(15), is to preserve the national security. The labelling requirements and the sanctions on the members have no rational relationship to, and are unnecessary for that objective. Their purpose is to injure the organization and its members even in the most innocuous of pursuits and regardless of personal innocence. (See *supra*, pp. 37-39, 54-56). Accordingly, the labelling provisions and the sanctions "[bear] no rational connection to the purposes of the legislation of which [they are] a part, and must without more therefore be taken as evidencing a Congressional desire to punish." *Flemming* v. *Nestor*, *supra*, at 617. Cf. *Garner* v. *Board of Public Works*, *supra*, at 722-23.

The number, quality and destructive impact of the Act's sanctions demonstrate their punitive nature. The members suffer much more than a single, limited "loss of position" imposed in order "to forestall future dangerous acts." *American Communications Association* v. *Douds*, 339 U. S. 382, 413, 414. The sanctions, moreover, are imposed solely because of association, without reference to the fitness

of the individuals to enjoy the denied privileges if judged on their own merits as individuals, and without regard to their lack of guilty knowledge.

A member of the organization can escape the disabilities by leaving it. But a forced deprivation of the privilege of association is itself punishment. As *Cummings* held (at 324): "These bills may inflict punishment absolutely, or may inflict it conditionally." If Congress were to place special disabilities on members of a particular religion the legislation would be invalid as a bill of attainder even though the members could avoid the disabilities by abandoning their church.

Moreover, if the members of the organization escape the Act's sanctions by leaving it, the organization thereby is destroyed. Hence the organization has no escape from the registration death sentence which the Act visits against it.

4. The Act purports to require the registration of Communist-action organizations and their members as participants in a foreign-controlled conspiracy to commit espionage, sabotage, treason, violent revolution, and other crimes on behalf of a foreign power. The Act thus establishes a mechanism to prosecute accused persons not for their alleged crimes, but for their failure to register themselves as criminals. The only rational explanation for this shift of the locus of punishment from the crime itself to failure to register as a criminal is that the Act seeks to punish Communists as criminal conspirators even though they are not and cannot be proved to be such. Thus the Act "is evidently aimed at the person or class of persons" and is punitive. *Flemming* v. *Nestor, supra,* at 614.

5. The legislative history [26] confirms our analysis.[27] It shows that the Act was designed to punish petitioner and its members for alleged conduct which was already criminal but which could not be proved against them in judicial proceedings.

The Act originated in the Mundt bill (H. R. 4422, 80th Cong., 1st Sess.), which would have required "any person who is a member of the Communist Party" to register as a foreign agent under criminal penalties for non-compliance.[28] However, the Congress was informed by Attorney

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[26] The bill enacted was the Senate rewrite, sponsored by Senator McCarran, of H.R. 9490, 81st Cong., 2d Sess. (Wood bill). The antecedent bills were: H.R. 4422, 80th Cong., 1st Sess. (Mundt bill); H.R. 5852, 80th Cong., 2d Sess. (Mundt-Nixon bill); H.R. 3342, 81st Cong., 1st Sess. (Nixon bill); S. 1194 and S. 1196, reported out as S. 2311, 81st Cong., 1st Sess. (Mundt-Ferguson-Johnson bill); S. 4037, 81st Cong., 2d Sess. (McCarran bill); H.R. 7595, 81st Cong., 2d Sess. (Nixon bill). Applicable committee reports are: H. Rep. 3112, 81st Cong., 1st Sess. (Conference Report on H.R. 9490); H. Rep. 1844, 80th Cong., 2d Sess. (on H.R. 5852); Sen. Rep. 1358, 81st Cong., 1st Sess. (on S. 2311); H. Rep. 2980, 81st Cong., 2d Sess. (on H.R. 9490); Sen. Rep. 2369, 81st Cong., 2d Sess. (on S. 4037). Applicable hearings are: Before Subcommittee on Legislation of Committee on Un-American Activities, H.R. 80th Cong., 2d Sess., on H.R. 4422 and H.R. 4581 (Feb. 1948), hereafter cited as *House Hearings;* Before Committee on Judiciary, Sen., 80th Cong., 2d Sess., on H.R. 5852 (May 1948), hereafter cited as *Senate Hearings;* Before Committee on Judiciary, Sen., 81st Cong., 1st Sess., on S. 1196 (April-June 1949); Before Committee on Un-American Activities, H.R., 81st Cong., 2d Sess., on H.R. 3903 and H.R. 7595 (March 1950).

[27] Legislative history is relevant, and may be crucial, in determining whether disabilities are penal or regulatory. *United States v. Lovett, supra.*

[28] Section 1 of the Mundt bill provided: "That notwithstanding the provisions of any other law any person who is a member of the Communist Party or of any organization, association, or other combination of individuals which is dominated, directed or controlled by the Communist Party, shall be required to register with the Department of Justice, Washington, District of Columbia, as an agent of a foreign principal." Mr. Mundt later proposed that his bill be amended, for purposes of administrative convenience, to require registration by the Party itself, rather than by the individual members. *House Hearings*, p. 4. The bill is quoted in these hearings at p. 2.

General Clark and others testifying before the legislative sub-committee of the House Committee on Un-American Activities, that this singling out of the Communist Party by name was probably unconstitutional as fiat legislation violating the due process and bill of attainder clauses. (*House Hearings*, pp. 19-20, 113, 115, 117, 209-11, 256, 432, 493-95.)

Because of these warnings, the Committee on Un-American Activities rejected the approach of the Mundt Bill and reported the Mundt-Nixon bill (H. R. 5852, 80th Cong., 2d Sess.), which first proposed the scheme of an administrative proceeding to determine registerable organizations. Representative Nixon, chairman of the legislative sub-committee of the Committee on Un-American Activities and co-author of the bill, explained to the Senate Judiciary Committee the reason for the change (emphasis added):

> "We felt also that the Mundt bill, in its original form, was not the proper approach to the problem for two reasons. In the first place, the bill specifically named the Communist Party of the United States and attempted to build its definitions around the name of the party. From having heard the witnesses before our committee, we came to the conclusion that naming the Communist Party by name and attempting to build the entire registration provisions around such a definition was an unconstitutional approach and *consequently the committee attempted to find a legislative device for meeting the problem in a constitutional manner* * * *" (*Senate Hearings*, p. 40.)
>
> "Our committee realizes that it would be a very dangerous thing to bring to the Congress and to the Senate a measure which went too far and which ran a great risk of being held unconstitutional by the Supreme Court because we realize that the Communists would make great capital of such a holding. For that reason alone our committee was particularly careful to attempt to find a constitutional answer to this problem. That is the reason that we do not name the Communist Party." (*Senate Hearings*, pp. 45-46.)

The House and Senate Committees also informed the Congress in their reports on the bill which became the Act:

> "To make membership in a specifically designated existing organization illegal *per se* would run the risk of being held unconstitutional on the ground that such an action was legislative fiat." (H. Rep. No. 2980, 81st Cong., 2d Sess., on H. R. 9490, p. 5; Sen. Rep. No. 1358, 81st Cong., 1st Sess., on S. 2311, p. 9.)

Accordingly, constitutional doubts alone prevented the authors of the Act from actually naming petitioner in the text of the Act. As we have shown, however (*supra*, pp. 61-62), they otherwise unmistakably identified petitioner as the intended victim.

The legislative history further shows that the Act was thought necessary because the Department of Justice was unable to prove that petitioner or its members were violating the criminal statutes against sedition and failure to register as foreign agents. Justifying the failure to use such existing legislation against the petitioner or its members, Attorney General Clark explained to the House Committee:

(a) As to the failure to prosecute under the Smith Act, 18 U. S. C. 2385:

> "By means of this statute, we are able to prosecute, provided we are able to obtain proof of force or violence * * *. Adequate proof against the individual in this regard is most difficult to adduce. In fact, the dignitaries of the American Communist Party have each denied that they have any aim or purpose to overthrow the Government by force or violence. Because of the shifting program and the character of the Party line, which can adjust itself to suit almost any limitation, we have found it more practical, effective, and much more speedy to proceed under other Federal statutes." (*House Hearings*, p. 21.)

(b) As to the failure to prosecute the Communist Party for not registering under the Voorhis Act, 18 U. S. C. 2386:

> "In order to force a registration or to prosecute any organization for failing to register under the act, we must prove in one or more of the combinations described in the act that the purpose or aim or one of the purposes or aims of the organization is to overthrow by force or violence the Government of the United States, or that the organization is engaged in civilian military activity prohibited by the statute or is subject to foreign control.
>
> "The fact is that the description of activities which make it obligatory for an organization to register is enough to brand the organization as subversive. As soon as the Voorhis Act was passed, * * * the Communist Party changed its constitution for the purpose of disaffiliating, as the announcement put it at the time, from the Communist International in order to avoid registering under what the party called the Voorhis Blacklist act. * * *
>
> "You have asked me what, in my opinion, is the true character and aim of the Communist Party in the United States, Mr. Chairman. The ultimate question, however, is not what my opinion may be, but what proof exists to successfully prosecute an individual or organization under the above statutes. Although the Voorhis Act has been on the books since 1940, no Attorney General has directed a prosecution under it." (*Ibid.*)

(c) As to failure to prosecute the Communist Party or its members for not registering under the Foreign Agents Registration Act, as amended:

> "By the provisions of this act, agents of foreign principals are required to file a registration statement with the Attorney General and to label political propaganda disseminated by them. The terms of the act are sufficiently broad to require registration by members of the Communist Party; provided, of course, that proof is available that they are operating in this country as agents of a foreign principal. This is a difficult task. * * * " (*Id.*, pp. 21-22.)

The sponsors of the legislation, accepting the Attorney General's testimony, informed Congress that the Act was necessary because the Communist Party could not be proved, by accepted legal standards, to be a seditious foreign agent. The Senate Committee stated that the Act was required by the "inadequacy" of existing legislation. It explained:

> "Congress has passed several laws which were directed specifically at curbing the subversive activities of communism in the United States, but they have proved largely ineffectual in accomplishing their purpose. As has been cited above, the Attorney General on February 5, 1948, testified before a committee of Congress that present laws were inadequate to deal with the subversive activities of the Communist threat in the United States.[29] There have been no significant additions to statutory law in this field since that date." (Sen. Rep. No. 1358, *supra*, p. 7.)[30]

The House Committee Reports contain passages to the same effect as to the "inadequacy of existing legislation" (H. Rep. No. 2980, *supra*, p. 2; H. Rep. No. 1844, *supra*, p. 5), and Representative Nixon made a similar explanation when testifying before the Senate Committee (*Senate Hearings*, pp. 41-43).

The Act has all the earmarks which historically characterize bills of attainder. They are the product of periods of savage political intolerance and hysteria. See Story's *Commentaries*, sec. 1344. They commonly represent a charge made by an angry and vindictive legislature of subverting the government or engaging in acts claimed to be prejudicial to the national security. See, *e.g.*, bills attainting the Earl of Strafford, 3 How. St. Tr. 1382, 1518; Earl of Clarendon, 3 How. St. Tr. 318, 392; Bishop of Rochester, 16 How. St. Tr. 323; Archbishop Laud, 4 How.

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[29] The reference is to the testimony of Attorney General Clark which we have just reviewed.

[30] The Report goes on to explain the "inadequacy" of each of the "present laws" along the lines of Attorney General Clark's testimony.

St. Tr. 598, 599. They are used where the evidence is insufficient to prove guilt or where the government is not satisfied with the severity of the punishment conventionally imposed for an offense. Woodeson, *Law Lectures* (1792) 653 ff.; Miller, *Lectures on Constitution of the United States* (1893) 584. As we have seen, these are precisely the considerations which inspired the Act and determined its form.

VI. The Act is invalid because it denies a judicial trial by making the Board's determinations of fact conclusive in subsequent criminal prosecutions.

Once the Board's determination that an organization is a Communist-action organization becomes final, it supplies a predicate for criminal prosecutions of petitioner and its officers for failure to register petitioner, and for criminal prosecutions of petitioner's members for failure to register themselves, for holding employment forbidden to members, or for applying for passports. It is a necessary element of each of these offenses that petitioner be a Communist-action organization, since the various penalties apply only to such organizations, their officers, and members. Yet this element has been conclusively determined by the Board in an administrative proceeding and cannot be relitigated in the criminal trials.

Accordingly, as to this element of the crime, the Act denies a judicial trial, indictment by grand jury, as required by the Fifth Amendment, and trial by petit jury, as required by the Sixth Amendment and Art. III, sec. 2, cl. 3.

The invalidity of the Act in these respects is established by *Wong Wing* v. *United States*, 163 U. S. 228. The statute involved there authorized imprisonment at hard labor upon a non-jury finding that a Chinese alien was illegally present in the United States. The Court recognized that an alien's illegal presence could be determined without a jury and

even non-judicially for the purpose of excluding or expelling him. But it held that criminal penalties could be attached to the alien's illegal presence only if that fact were found according to procedures which satisfied the Constitution's provisions as to criminal trials.

The issue whether a criminal prosecution may be based on administrative determination of one or more elements of the offense arose, but was not reached by the Court, in *United States* v. *Spector*, 343 U. S. 169. The statute there provided criminal punishment for an alien's failure to comply with an administrative order of deportation. Mr. Justice Jackson's dissenting opinion, in which Mr. Justice Frankfurter joined, condemned the statute. The observations of the dissent (at 177-179) are applicable to the present Act:

> "This Act creates a crime also based on unlawful residence in the United States. The crime consists of two elements: one, an outstanding order for deportation of an alien; the other, the alien's willful failure to leave the country or take specified steps toward departure. The Act does not permit the court which tries him for this crime to pass on the illegality of his presence. Production of an outstanding administrative order for his deportation becomes conclusive evidence of his unlawful presence and a consequent duty to take himself out of the country, and no inquiry into the correctness or validity of the order is permitted.
>
> "The subtlety of the present Act consists of severing the issue of unlawful presence for administrative determination which then becomes conclusive upon the criminal trial court. • • • And if vital elements of a crime can be established in the manner here attempted, the way would be open to effective subversion of what we have thought to be one of the most effective constitutional safeguards of all men's freedom."

The Act is even more vulnerable than the statutes involved in *Wong Wing* and *Spector*. In those cases the ac-

cused had been a party to the administrative or non-jury proceeding. But under the Act, the member prosecuted for not registering, applying for a passport, or holding a forbidden job, is not a party to the administrative proceeding which determines that the organization is a Communist-action organization. Nevertheless, this determination, made without benefit of judge or jury, is conclusive in a prosecution against him.[30a]

Criminal penalties may be imposed for violations of administrative rules and regulations. And in such cases the accused may be limited to challenging the validity of the administrative regulation in a proceeding other than the criminal trial. *Yakus* v. *United States*, 321 U. S. 414. But those principles apply only to administrative rule-making, not to administrative adjudications as to the conduct or guilt of specific respondents. Justice Jackson pointed out this key distinction in *Spector* at 179.

VII. The Act violates due process by establishing a Board which is necessarily biased and has an interest in the event.

"When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality." *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 50. "Trial must be held before a tribunal not biased by interest in the event." *Fay* v. *New York*, 332 U. S. 261, 288. "Fairness of course requires an absence of bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U. S. 133, 136.

In violation of these principles of due process, the Act exerts compelling pressure on the Board to decide against petitioner and gives the Board members a personal stake, financial and otherwise, in so deciding.

[30a] Petitioner has standing to litigate this denial of the constitutional rights of its members. See *supra*, p. 50.

The Board is set up as a permanent agency, which originally had the sole function of identifying Communist-action organizations, their members and Communist-front organizations. Since Communist-action organizations are by definition tools of a Communist-action organization, they can exist only if the Board finds that there is an action organization.[31]

The Act and its legislative history contemplate the existence in the United States of only one Communist-action organization, the petitioner (see *supra*, pp. 60-62). And even if Congress had considered that there might be more than one, it is certain that it believed petitioner to be the principal organization of that character.

It is clear, therefore, that if the Board had decided that the petitioner was not a Communist-action organization, it would have prevented the Act from being applied to any organization.

This fact has been recognized by the Attorney General and the Board itself. Although the case against the petitioner was pending before the Board for over two years, the Attorney General instituted no proceeding during that time against any other organization. Yet only two days after the Board issued its registration order against petitioner, the Attorney General filed twelve petitions with the Board, all charging that the organizations named were Communist-front organizations controlled by the petitioner as a Communist-action organization. All subsequent petitions filed by the Attorney General have charged the accused organizations with being "fronts" of or "infiltrated" by petitioner. In the ten years that the Act has been in existence, only one organization, the petitioner, has been

[31] After the registration order was issued, the Communist Control Act gave the Board the additional function of identifying Communist-infiltrated organizations. The definition of the latter also presupposes the existence of a Communist-action organization (sec. 3(4A)).

charged before the Board with being a Communist-action organization.

The first two chairmen of the Board both advised Congressional appropriation committees that the continued functioning of the Board depended entirely upon the entry of a registration order against petitioner. The first chairman of the Board advised the appropriations committee:

> "Now, of course, the fundamental agency that covers all of these 130 organizations [on the Attorney General's list of 'subversive organizations'] is the Communist Party because they are all splinter groups from the Communist Party, and if the Communist Party is not found to be subversive then this splinter group cannot be so found." [32]

The second chairman of the Board informed the committee (emphasis supplied):

> "The Attorney General advises that some 25 petitions will be filed with the Board during the balance of this fiscal year *in the event the Board's final decision orders the Communist Party so to register.*" [33]

Thus it appears that the Board was told, in *ex parte* conversation with the only litigant empowered to initiate proceedings before it, that it would get additional business only if it decided for that litigant in the pending case against petitioner.

The following colloquy regarding the case against petitioner also occurred between a member of the appropriations sub-committee and the second chairman of the Board:

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[32] Hearings before Subcommittee of Committee on Appropriations, H. R., 81st Cong., 2d Sess., on Second Supplemental Appropriations Bill for 1951, p. 263.

[33] Hearings on Independent Offices Appropriations for 1954 before Subcommittee of Committee on Appropriations, H. R., 83rd Cong., 1st Sess., p. 188 (Feb. 23, 1953), and see also at pp. 190, 196-98.

"Mr. Cotton: The case is of paramount importance, upon which the whole structure rests, and without which there can be no structure.

"Mr. Brown: Yes."[34]

The "structure," of course, was the Board and the Act.

As its chairmen recognized, the Board, therefore, could not have decided in favor of the petitioner without rendering itself *functus officio* and, in effect, repealing the Act. It is inconceivable that an administrative agency would have the temerity to frustrate the will of Congress by repealing the Act which created it. Accordingly, irresistible pressure was exerted on the agency to decide in the only way which would preserve the Act and the agency—that is, against the petitioner.

The pressure on the Board to preserve itself and the Act by deciding against petitioner was intensified by considerations of personal interest. The members of the Board had to rule against petitioner if they were to have any further business and thus keep their jobs, salaries and the appointment patronage available to them as heads of an agency. Yet *Tumey* v. *Ohio*, 273 U. S. 510, flatly holds that it is a violation of due process to commit adjudication to one who has either a financial or official stake in the outcome of the case. The Court stated (at 532):

> "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law."

The jobs of the members of the Board staff, including those who assisted the Board in preparing the decision.

[34] Id., pp. 198-99. For testimony to the same effect given by Mr. Brown a year earlier, see Hearings on Independent Offices Appropriations for 1953 before Subcommittee of Committee on Appropriations, H. R., 82d Cong., 2d Sess., pp. 245, 248 (Jan. 16, 1952).

were also staked on a decision adverse to the petitioner. The Board's reliance on such interested staff members in reaching its decision was at least as unfair as if it had utilized findings prepared by the active prosecutors for the government after an *ex parte* discussion which the petitioner had no opportunity to meet. Yet the latter procedure was held in *Morgan* v. *United States*, 304 U. S. 1, 22, to vitiate adjudication as "a vital defect."

Under the circumstances, it is not surprising that the bias of two members of the Board manifested itself in indecorous conduct during the proceedings. After issuance of the hearing panel's recommended decision, and while the proceeding was pending before the full Board, Peter Campbell Brown, chairman of the Board and the hearing panel, appeared with the Board's general counsel on a radio and television program, commented on the evidence, expressed delight with the recommended decision, and stated the conviction that petitioner is a Communist-action organization (R. 197-98, 206-08).

During the course of the administrative hearing, likewise, Board and hearing-panel member McHale made a speech before the Women's National Democratic Club in which she discussed the proceeding and expressed prejudgment on issues in the case (R. 187-90, 193-96).

In the *Fay* case *supra*, at 288, the Court recognized that a system of jury selection "could be so manipulated as to call a jury before which defendants would have so little chance of a decision on the evidence that it would constitute a denial of due process." The statute here so manipulates the character of the Board that petitioner had no chance at all of a decision on the evidence.

VIII. The Act violates due process because of its vague and irrational standards.

Under section 3(3), a Communist-action organization is distinguished by two characteristics: (a) foreign control and (b) advancement of the objectives of the world Communist movement "as referred to in section 2." We have already seen (*supra*, pp. 30-31) that section 2 is thoroughly ambiguous and vague as to the nature of these objectives. This fact in itself unsettles the ultimate determination to be made by the Board.

The defect is compounded by section 13(e), which directs the Board to take eight criteria into consideration in determining whether an organization meets the section 3(3) definition. As to foreign control, the criteria are nebulous, circumstantial and largely irrelevant. As to objectives, only three of the eight criteria ("directives and policies," "nondeviation" and "secret practices") relate to objectives of any kind, and none of these is pertinent to any of the various meanings of objectives which can be extracted from section 2. We will examine each of the criteria.

"Directives and policies." Section 13(e)(1) directs the Board to consider "the extent to which" the accused organization formulates and carries out its policies or performs its activities "pursuant to directives or to effectuate the policies" of the foreign government which directs and controls the world Communist movement described in section 2.

This section does not require the Board to consider whether the organization seeks to establish a "Communist totalitarian dictatorship" as described in section 2, much less to use the unlawful means to which section 2 refers. Thus the section is not relevant to either of the two possible definitions of the objectives component. On the contrary, the section authorizes the Board to consider the fact that an organization seeks to effectuate Soviet policies on *any* subjects as evidence that the organization operates to advance the particular objectives, whatever they are, referred to in section 3(3).

"Non-deviation." Section 13(e)(2) directs the Board to consider "the extent to which" the accused organization's views and policies "do not deviate from those of" the Soviet Union. The section does not confine the inquiry to Soviet views and policies on particular matters. Accordingly, non-deviation from any of the countless views expressed by the Soviet Union becomes evidence of foreign control and of a purpose to advance the objectives ascribed to the world Communist movement by section 2.

This test is irrational in several respects.

(1) It permits the advancement of the seditious objectives described in section 2 to be established by proof of "non-deviation" from views and policies which are either unrelated to the national interest or are in fact calculated to promote the welfare of the United States and its people. The court below acknowledged that this standard has no relevancy to the objectives component of the section 3(3) definition, asserting that "the point" of the test is "foreign domination" (Ops. 45).

(2) Identity of views cannot be a rational criterion of Soviet control if the views involved are not peculiarly characteristic of the Soviet Union, if they are widely held by non-Communists, if they are demonstrably true, or if they are arrived at independently by the accused organization. Yet the standard ignores these factors. Under this obscurantist test, the stigma of foreign control and sedition can be avoided only by adopting views which are demonstrably false if the Soviet Union has adopted views which are demonstrably true. In the area where views may reasonably differ, the stigma can be avoided only by mechanically opposing any position taken by the Soviet Union, regardless of its merits, thus subjecting oneself to Soviet control in reverse.[35]

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[35] As we later point out (*infra*, pp. 111-17), the Board applied all the irrational features of the non-deviation test, predicating guilt on views which concededly may be in the national interest, demonstrably true, widely held, and independently arrived at.

"Financial Aid." Section 13(e)(3) directs the Board to consider "the extent to which" an accused organization "receives financial or other aid, directly or indirectly, from or at the direction of the foreign government or organization that directs, dominates and controls the world Communist movement described in section 2."

It is obvious that a contribution to a cause which the contributor deems worthy of support does not thereby subject the recipient to the "direction, domination or control" of the contributor. Nor does it make the recipient the agent of the contributor "to advance the objectives" of the latter, let alone to advance specific objectives. History and experience provide many examples of aid by governmental and non-governmental bodies to organizations which they do not "dominate or control" and which operate to promote their own objectives, not those of the donor. Similarly, it is well known that bad people contribute to good causes, and vice versa.

Of course, the giving or withholding of financial assistance may be a lever by which the contributor secures and exercises control of the recipient. In that case, the relevant consideration is not the bare fact of aid, but the terms and conditions, if any, on which it is given. But, as the court below acknowledged (Ops. 46), section 13(e)(3) does not direct the Board to consider the relevant factor of terms and conditions, but focuses exclusively on the irrelevant factor of aid.

"Instruction and Training." Section 13(e)(4) directs the Board to consider "the extent to which" an accused organization "sends members or representatives to any foreign country for instruction or training in the principles, policies, strategy or tactics" of the world Communist movement.

This test is irrational because it does not require a showing that the accused organization is obliged to or does conform to what is taught.

"Reporting." Section 13(e)(5) directs the Board to consider "the extent to which" an accused organization "reports to" the Soviet Union or the foreign organization which assertedly controls the world Communist movement. This test is irrational because it makes "reporting" proof of foreign control without regard to the nature and content of the "report," the purpose for which it was given, or its use, if any, by the recipient. Labor, business, religious, scientific, cultural and political organizations customarily receive reports at their gatherings as a means of exchanging and sharing knowledge, experiences, and ideas. Under the preposterous theory of this subsection, those who report at such gatherings furnish evidence that they are "dominated and controlled" by the sponsoring organization.

"Discipline." Section 13(e)(6) directs the Board to consider "the extent to which" the organization's "principal leaders or a substantial number of its members are subject to or recognize the disciplinary power" of the alleged foreign principal. This standard permits the condemnation of the organization upon proof of the disciplinary status or subjective attitude of some of its leaders or members, notwithstanding that they may be an unrepresentative or dissenting minority and that the organization itself is completely independent.[36]

"Secret Practices." Section 13(e)(7) directs the Board to consider "the extent to which" the accused organization

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[36] In condemning a similar clause in the Mundt-Nixon bill, the antecedent of the act, Mr. John W. Davis wrote the Senate Judiciary Committee in response to its request for his comments: "But assume, if you will that the organization contains some members or even some 'leaders' who * * * recognize the disciplinary power of such foreign government. * * * how many or what proportion of such individuals are to be held sufficient to color the entire organization? What is to be the status of a dissenting member, a minority of members or even a majority who do not hold such views? Are they and the organization to be condemned on the principle of *noscitur a sociis*, i.e., guilt by association?" *Senate Hearings*, p. 421.

conceals the identity of its members and the contents of its records and otherwise operates on a secret basis "for the purpose of concealing foreign direction, domination or control, or of expediting or promoting its objectives."

This test is incapable of rational application. It makes "secret practices" relevant only if employed for the purpose of concealing foreign control or promoting the organization's objectives. The first of these purpose limitations involves circular reasoning, since foreign control is one of the ultimate facts to be established under section 3(3). Obviously, a standard whose application requires proof of an ultimate fact cannot be used to determine the existence of the ultimate fact. As to the second purpose limitation, if the reference is to promotion of the objectives attributed to the world Communist movement by section 2, then the same circuity exists. If on the other hand, "objectives" embraces all possible organizational purposes, then the secrecy test has no rational relation to the ultimate fact to be proved—*i.e.*, advancement of the particular objectives referred to in section 2.

"*Allegiance.*" Section 13(e)(8) directs the Board to consider "the extent to which" the accused organization's "principal leaders or a substantial number of its members consider the allegiance they owe to the United States as subordinate to their obligations" to the Soviet Union or the foreign organization which allegedly controls the world Communist movement.

The "allegiance" test is completely subjective. It directs an inquiry into a pure state of mind. Moreover this mental state may be entirely the product of a voluntary ideological conviction. Accordingly, the mental state does not tend to show the existence of foreign control.

The section also assumes the facts prerequisite to the state of mind into which the Board is to inquire. It does not direct the Board to determine whether any of the organization's leaders or members owe obligations to the

Soviet Union or a foreign organization. It assumes that they do owe such obligations and confines the Board's inquiry to whether they "consider" these obligations subordinate to their allegiance to the United States. Furthermore, this section, like that on "discipline," imputes to the organization the state of mind of its "principal leaders or a substantial number of its members" although they may be an unrepresentative or dissenting minority and though the organization itself is completely loyal.

The standards of section 13(c) are vague, as well as irrational. The Act nowhere indicates whether a registration order must be supported by adverse findings under all eight standards, or whether something less is sufficient. In this connection it is significant that the Mundt-Nixon bill, which was the antecedent of the Act, directed the Board to consider "some or all" of the evidentiary standards which it contained. The vagueness of this language was criticized as unconstitutional by Charles Evans Hughes, Jr., who was invited by the Senate Judiciary Committee to comment on the pending measure (*Senate Hearings*, p. 417). Seth Richardson, who later served as the first Chairman of the Board, commented in response to the Committee's invitation that this language "leaves the measure of the envelopment of the particular organization in any of the activities noted, to depend largely on the particular cast of mind of whatever person the bill proposes shall reach the conclusion" (*id.*, p. 445). It was apparently to avoid these criticisms that the words "some or all" were omitted from the bill as enacted. Clearly, however, this omission does not cure the defect, but only adds ambiguity to uncertainty.

The obscurity which thus envelops section 13(c) is made even more impenetrable by the phrase "the extent to which," which prefaces each of the eight standards. In commenting on this phrase, which appeared in the original Mundt-Nixon bill, John W. Davis stated: "Or take the introductory phrase itself as used throughout—'the

extent to which, etc.'—what are the limits which these words envisage? To how great an extent, how customary a practice, how definite, pervasive, or continuous a policy? There would seem to be no room here for the application of any doctrine of *de minimis*." Mr. Davis concluded that the vagueness and uncertainty of the standards of the Mundt-Nixon bill vitiated the entire bill. (*Id.*, pp. 420-22.)

The foregoing examination of section 13(c) shows that it perverts the function of the orthodox legislative enumeration of factors to be taken into account by an administrative agency in reaching its determination. The legitimate role of such an enumeration is to give definite content to a generalized ultimate standard."[37] Section 13(c), however, does nothing to cure the vagueness of the ultimate standard set forth in the objectives component of section 3(3). Moreover, it unsettles the reasonably definite and meaningful standard contained in the control component. Indeed, the court below relied on section 13(c) to support its construction of the control component as being satisfied with nothing more than voluntary adherence to Soviet views (Ops. 93). Of course, if this is the intended meaning of the control component, then it too is hopelessly vague, as well as completely at odds with the First Amendment. On the other hand, if the control component refers to control in its meaningful and orthodox sense, then the irrational and vague standards of 13(c) authorize petitioner's conviction of one thing on proof of another. In any event, the latter holds true for the objectives component.

Congress has the power to prescribe rules of evidence, including presumptions, in judicial or administrative pro-

[37] For examples of legislation in which legislative guides were employed to give more definite content to generalized ultimate standards, see the statutes involved in *Yakus* v. *United States*, 321 U. S. 414; *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U. S. 126; *Hampton, Jr. & Co.* v. *United States*, 276 U. S. 394; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381.

ceedings. But the due process clause limits that power by forbidding the substitution of legislative fiat for proof. As stated in *Tot* v. *United States*, 319 U. S. 463, 467:

> "But the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the *proof* of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated * * *. Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience."

And as stated in *Manley* v. *Georgia*, 279 U. S. 1, 6:

> "A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause."

Accordingly, the legislature may validly establish a presumption of fact only if there is a rational connection between the fact to be proved and the ultimate fact to be presumed. *Manley* v. *Georgia*, *supra*; *Adler* v. *Board of Education*, 342 U. S. 485, 496; *Tot* v. *United States*, *supra*; *Western & Atlantic Railroad* v. *Henderson*, 279 U. S. 639; *McFarland* v. *American Sugar Co.*, 241 U. S. 79; *Bailey* v. *Alabama*, 219 U. S. 219. As we have shown, section 13(e) does not meet this requirement.

The court below held that any defect in the section 13(e) standards is not fatal because the "catalog in Section 13(e) is not exclusive" (Ops. 42). That circumstance, if true, does not save the Act. The fact that the Act authorizes the Board to decide on the basis of irrational standards is enough to invalidate it. As stated in *Bailey* v. *Alabama*, 219 U. S. 219, 235 (emphasis in original):

> "It is not sufficient to declare that the statute does not make it the *duty* of the jury to convict, where there is no other evidence but the breach of the contract and the failure to pay the debt. The point is that, in such case, the statute *authorizes* the jury to convict. It is not enough that the jury may not accept that evidence as alone sufficient; for the jury may accept it, and they have the express warrant of the statute to accept as a basis for their verdict. And it is in this light that the validity of the statute must be determined."

The fact is that the Act is invalid if any one of the standards of 13(c) is irrelevant to the ultimate issue. This appears not only from *Bailey* v. *Alabama*, but from the elementary logic that if any one of the propositions from which a conclusion is drawn is not valid, then the conclusion itself has not been demonstrated valid.

Section 13(c) and the objectives component of section 3(3) also violate due process because the vagueness which we have described strips them of any ascertainable standard for judgment. Such an unfettered delegation of power violates due process and Article I, section 1 of the Constitution. *Burstyn* v. *Wilson*, 343 U. S. 495; *Winters* v. *New York*, 333 U. S. 507; *Niemotko* v. *Maryland*, 340 U. S. 268; *Stromberg* v. *California*, 283 U. S. 359; *Herndon* v. *Lowry*, 301 U. S. 242; *Connally* v. *General Construction Company*, 269 U. S. 385; *Lanzetta* v. *New Jersey*, 306 U. S. 451; *Panama Refining Co.* v. *Ryan*, 293 U. S. 188.

In those cases, criminal and regulatory statutes containing far more definite and ascertainable standards than section 13(c) were invalidated for their failure to measure up to this essential requirement of due process. As the cited cases also show, narrowly drawn and definite standards are of special importance where, as here, the conduct subject to regulation lies in the area guarded by the First Amendment.

In *Winters*, the Court stated (at 518):

> "The present case as to a vague statute abridging free speech involves the circulation of only vulgar magazines. The next may call for decision as to free expression of political views in the light of a statute intended to punish subversive activities."

This is the "next case" anticipated in *Winters*. If political expression is to be protected by the same due process standard that safeguards vulgar magazines, the Act must be condemned for failure to meet that standard.

IX. The Act violates due process because it is impossible under Section 5 of the Communist Control Act to determine who are members of the petitioner.

The Act makes it necessary for petitioner and its officers to determine who are members of petitioner. If the order of the Board becomes final, petitioner and its officers will be required to list the names of all the members in petitioner's registration statement (sec. 7(d)(4)). Other persons must determine whether they are members of petitioner in order to know whether they may lawfully hold certain jobs or apply for passports. The Board must make the same determination in proceedings to compel alleged members to register themselves upon failure of the organization to file a registration statement listing their names.

Section 5 of the Communist Control Act (50 U. S. C. 844) sets forth criteria for determining membership in the Communist Party. In preparing a registration statement, petitioner and its officers must apply these criteria if they are to avoid the criminal penalties of section 15 of the Act

for failure to list a member or for making a false listing.[38] Other persons must similarly apply the section 5 criteria if they are not to incur the penalties of section 15 for engaging in conduct forbidden to members of Communist-action organizations. And the Board must apply the criteria in administrative proceedings against alleged members.

Section 5, however, prescribes such vague and irrational criteria that it is impossible for petitioner, its officers or others to determine the identity of petitioner's members. Moreover, the application of these criteria requires a knowledge of facts which petitioner, its officers, and possible "members" cannot have or obtain. Section 5 thus unsettles and invalidates the Act as a whole, including the registration requirements.

Section 5 provides that "in determining membership or participation in the Communist Party or any other organization defined in this Act, or knowledge of the purpose or objective of such party or organization, the jury, under instructions from the court, shall consider evidence, if presented" as to thirteen enumerated criteria. Even before examining these criteria, the introductory provision which we have quoted demonstrates that the entire section is invalid for two reasons.

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[38] It cannot logically be argued that the criteria of section 5 should be construed to apply only to cases where the membership of the accused is in issue, and hence would not apply in a prosecution of petitioner's officers for failure to list all of the members. Such a reading would anomalously establish a dual test of membership, under which an individual could be found to be a member for the purposes of self-registration and the sanctions on members, but not a member for the purposes of registration by the organization. In any event, the criteria of the section are plainly applicable in prosecutions of alleged members. Hence petitioner is presently injured by the fact that the criteria make it dangerous for any person to associate or have business dealings with petitioner or to express views similar to those held by it. This circumstance alone gives petitioner standing to litigate the validity of the section. See *supra*, p. 51.

In the first place, the quoted provision does not make the rule of evidence enunciated in section 5 applicable to prove membership in all organizations, but only in the Communist Party and in organizations which seek to effectuate the violent overthrow of the government. Obviously, there can be no rational basis for this classification.

Secondly, it appears from the introductory provision of section 5 that evidence as to one or more of the thirteen criteria of that section is admissible to prove indiscriminately (1) membership in petitioner, (2) "participation" in the petitioner, and (3) knowledge of the purpose or objective of the petitioner. Surely the identical criteria cannot rationally prove all three of these relationships, which involve entirely different concepts. Participation may exist without membership; knowledge of purpose may exist without either membership or participation; and membership or participation may exist without knowledge of purpose. *A priori*, before examining the individual criteria, it is apparent that a system of proof which equates membership, participation and knowledge of purpose must either be wholly irrational or based on vague and indefinite evidentiary standards or both.

Turning to the thirteen criteria themselves, it should first be noted that none of them is limited as to time. Any conduct within one of the criteria serves as evidence of *present* membership irrespective of the fact that it occurred in the remote past. Such a rule of evidence is patently irrational.

Under paragraphs (5) and (7) of section 5, a court and jury may infer membership in petitioner from the fact that the individual in question has acted in *any* capacity "in behalf of" petitioner or "has been accepted to his knowledge • • • as one to be called upon for services" by petitioner's officers or members. Under these paragraphs the fact that a person supplies professional or business services to the petitioner or that his services are recommended by the peti-

tioner or its members furnishes evidence that he is a "member" of petitioner. Under paragraph (2), a person who lends money to petitioner, regardless of the purpose and terms of the loan (including, for example, a mortgagee, or seller of goods on a running account) likewise furnishes such evidence.

Under paragraphs (6) and (11) membership may be inferred from the fact that the individual in question has "conferred with" officers or members of petitioner "in behalf of any plan or enterprise" of petitioner or "has advised, counseled or in any way imparted information, suggestions [or] recommendations" to any of petitioner's officers or members "in behalf of the objectives" of petitioner. As every one knows, petitioner's "plans," "enterprises" and "objectives" include various social reforms, such as the promotion of the trade union movement, the enactment of improved social security and welfare legislation, the elimination of discrimination against the Negro people, etc. Yet under paragraphs (6) and (11) any person who consults or advises with any officer or member of petitioner with reference to these "plans," "enterprises" or "objectives" thereby furnishes evidence that he is a member of petitioner.

Paragraphs (4), (9), (10), (11), (12), and (13) eliminate contact or communication between the individual in question and officers or members of the petitioner as a requisite to evidence of membership. Under these paragraphs, the holding of views similar to those expressed by Communists or even an attitude of receptivity to the views of Communists is made evidence of membership. These paragraphs permit a finding of membership from the fact that the individual in question:

1. Has executed plans of any kind of the petitioner (paragraph (4)).

2. Has prepared or circulated any written material "in behalf of the objectives and purposes" of petitioner (paragraphs (9) and (10)).

3. Has imparted information, suggestions, or recommendations to anyone "in behalf of the objectives" of the petitioner (paragraph (11)).

4. Has indicated in any way "a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes" of the petitioner (paragraph (12)).

5. Has "in any other way participated in the activities, planning, actions, objectives, or purposes of the organization" (paragraph (13)).

Under these paragraphs, anyone who has ever expressed a view or taken a position on any public question which is similar to the view or position taken by petitioner, thereby furnishes evidence of his membership in petitioner. If he so much as attends a public meeting called by petitioner or purchases a piece of its literature, he may be found, by that fact, to have indicated a willingness to carry out its plans, and hence to have supplied evidence of "membership." Indeed, since petitioner holds meetings for the purpose of attracting the public and publishes literature for the purpose of securing readers, attendance at a meeting or the purchase of literature ipso facto executes petitioner's "plan" to gain an audience.[39]

Under paragraph (8), a court and jury may consider as evidence of membership the fact that an individual has communicated in any way or form "orders, directives or plans" of the petitioner. A newspaper reporter who writes a story from one of petitioner's press releases, reports a

[39] Commenting on section 5, the *Newark Star Ledger* stated, "Such a law might be used to herd into prison thousands of persons who have never been Communists and who have no basic sympathy with the Communist conspiracy." 100 Cong. Rec. 15110. The *Wall Street Journal* said, "One of these provisions is that it would be evidence of cooperation with the Communist groups if any person has indicated a willingness to carry out aims and purposes of the party. For all we know the Communist Party may be against juvenile delinquency. So is this newspaper." *Id.*, 15111.

speech by one of its officers, or purports to expose its plans thereby furnishes evidence of his "membership" in petitioner.

In short, under the criteria of section 5, almost anyone may be found to be a member of petitioner.[40] For this reason alone the officers of petitioner cannot possibly comply with the membership listing requirement. Moreover, they cannot even attempt to apply the criteria of section 5 because these involve considerations of the past and present

[40] Counsel for petitioner apparently satisfy almost all of the thirteen criteria of membership merely by fulfilling their professional responsibilities in this case. In preparing our briefs and making our arguments, we have "executed * * * plans of any kind" of the petitioner, namely its plan to have the respondent's order set aside and thereby to survive (4th test). We have by our appearance before the Board and the courts "acted * * * in any * * * capacity in behalf of" petitioner (5th test). Naturally, we have "conferred with officers or other members" of our client, again "in behalf of" the "plan or enterprise" of having the respondent's order set aside (6th test). By preparing our briefs, including this one, we have "prepared documents" in behalf of the petitioner's "objectives and purposes" (9th test). By delivering our briefs to the courts as well as by giving copies to other lawyers, we have "delivered to others material * * * of any kind in behalf of" the petitioner (10th test). We have "counseled" and otherwise "imparted information, suggestions, recommendations" about this case to officers of the petitioner and to the Court ("anyone else") in behalf of petitioner's objective to have the respondent's order set aside (11th test). We have, by accepting this case, "indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives or purposes of the" petitioner (12th test). By our participation in this case we have "in any * * * way participated in the activities, planning, actions, objectives, or purposes of the" petitioner (13th test). If our fee is too modest, it may be that we have made a "financial contribution * * * in any * * * form" (2d test). And because lawyers are obliged to accept instructions from clients, perhaps we have, by representing petitioner, made ourselves "subject to the discipline of the organization in any form whatsoever" (3d test). If our client is sufficiently impressed by our legal abilities to recommend our professional services to those of its members who need lawyers, we meet the seventh test.

conduct and state of mind of others which petitioner and its officers cannot conceivably know or ascertain. How, for example, is an officer to know all the individuals who ever "indicated * * * in any * * * way a willingness to carry out in any manner and to any degree the plans, designs, objectives or purposes" of petitioner (paragraph (12))?

If the order of the Board becomes final, petitioner and its officers can be punished by a $10,000 fine and five years' imprisonment for each member omitted from the registration statement (section 15 (b) of the Act). But since they have no way of knowing whom to register, they are hopelessly caught between the criminal penalties for each omission of a member and the penalties for a false listing.

Any person whom the petitioner might register as a member would immediately incur public infamy and the ruinous sanctions of the Act. True, he could request the Attorney General to remove his name from the registration list on the ground that he was not a member, and institute a proceeding before the Board for that purpose if the Attorney General failed for five months to act favorably (secs. 7(g) and 9(b)). However, it is difficult to conceive that the individual so listed could prove that he was not a member in the light of the criteria of section 5, and particularly in view of paragraph (1) of that section which makes the appearance of his name on petitioner's registration statement evidence of his membership.

The situation of such an individual is scarcely less difficult even if he convinces the Attorney General or the Board that he is not a member and therefore should have his name stricken from the list. For in view of the repeal of 5(c) and 6(c) of the original Act by 7(c) of the Communist Control Act (50 U. S. C. 784(c), 785(c); 68 Stat. 778), he will have incurred the employment and passport sanctions of the Act from the moment that the registration statement was filed until the time when his name is stricken from the list. The patient dies before the doctor arrives.

A person whose name is not registered by petitioner is in a dilemma. He cannot possibly determine from section 5 whether he will be found to be a member or not. He must therefore choose between the risk of prosecution for not registering, and the certainty of losing his livelihood and becoming a pariah by registering.

If such an individual decides not to register, he must of course take every precaution to avoid doing anything that can be used as evidence of membership. He must not express a view on any question until he has first ascertained petitioner's position (a task which he undertakes at the risk of thereby supplying evidence that he is a member). Thereafter, he must either give voice to the contrary opinion or remain silent. He must abstain from association or communication with any person who is a member of petitioner. And since he has no way of determining who may be found to be a member, he must shun association or communication with all men. Prudence therefore dictates that he live the life of a hermit. But there is no safety for him even in that course. Since the criteria of section 5 are unlimited as to time, he may be dragged from his hermitage to be tried and convicted on the basis of some incident in his remote past.

Our description of the consequences of the membership criteria of section 5 is not the product of a lawyer's imagination run riot. Congressional committees and loyalty boards have blasted the reputations and ruined the careers of hundreds of individuals and frightened thousands of others into silence by using precisely the same criteria to identify and expose "Communists." The authors of the Communist Control Act merely copied this technique of McCarthyism, wrote it into law, and implemented it with the intolerable sanctions of the Act.

PART TWO: THE MISCONSTRUCTION AND MISAPPLICATION OF THE ACT

I. The Board and the court below misconstrued and misapplied the "foreign control" component of section 3(3).

A. The Meaning of Foreign Control.

The section 3(3) definition of a Communist-action organization requires the presence of two components, the first of which is that the organization be "substantially directed, dominated, or controlled" by the Soviet Union.

This postulates a relationship in which the Soviet Union exercises a power to exact compliance with its demands from a domestic organization. It is not satisfied by an organization's voluntary adherence to Soviet policies or objectives. "The requirement of control, in the absence of legal title or beneficial ownership, is not satisfied by acquiescence or by business considerations without binding force." *Atlantic City Electric Co.* v. *Commissioner*, 288 U. S. 152, 153-54. "Control" means "power or authority to manage, direct, superintend, restrict, regulate, direct, govern, administer, or oversee." Black's Law Dict. (4th ed.) 399; *Pacific Employer Ins. Co.* v. *Hartford Accident & Indemnity Co.*, 228 F. 2d 365, 368; *American Auto Trimming Co.* v. *Lucas*, 37 F. 2d 801; *Mid-Continent Petroleum Corp.* v. *Vicars*, 221 Ind. 387, 396, 47 N. E. 2d 972, 975; *Re Tyler*, 135 Neb. 667, 669, 283 N. W. 512, 514.

Control, therefore, presupposes the existence of some significant means whereby the superior can compel compliance with its requirements or at least impose sanctions for non-compliance. Absent any such means, control is not present. If conformity nevertheless exists, it is voluntary, not the product of control.

Control exists in the relationships of superior officer and soldier, employer and employee, principal and agent, controlling stockholder and corporation, because in each instance there is a mechanism for exacting conformity. But

control does not exist in the cases of the parishioner who attempts to live in accordance with the principles preached by his minister, the economist who is a disciple of Keynes, the man who out of friendship mows the lawn of his vacationing neighbor, or the boy who imitates the batting stance of a baseball star. These involve no control because there is no significant mechanism to enforce compliance, even though there is adherence to another's precepts, the serving of another's interests, or the copying of another's actions.

The Act requires not merely a latent power to control, but its exercise. This necessarily means that the subordinate must act on orders from the superior. Ordinarily, too, a control situation involves features designed to insure satisfactory compliance with the orders, such as the supervision of an employee by an employer or the reporting by a soldier to his commander.

This principle, that the first component of section 3(3) involves compliance which can be exacted rather than voluntary conformity, derives not only from the natural meaning of the terms "direction, domination or control," but also from their context in the Act. An organization will meet the second component of section 3(3) of the Act, *i.e.*, will operate primarily for the purpose of advancing Soviet objectives, either because it has to or because it wishes to. That is, the second component involves voluntary conformity at a minimum. Accordingly, if the first component requires no more, it is redundant.[41]

That section 3(3) refers to an enforceable control also appears from section 2(5), which describes Communist-

[41] On the other hand, the second component cannot be considered redundant on the theory that a controlled organization will necessarily promote the objectives of the controller. For the second component is satisfied only if the organization promotes *certain* objectives of the controller, i.e., the particular objectives described in section 2, as distinguished from other possible objectives.

action organizations as "organizations which are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country." Finally, imposition of the Act's severe sanctions for a conformity which stems from nothing more than ideological agreement would magnify the First Amendment objections to the Act.

In sum, the foreign control component requires proof that the Soviet Union (1) issues orders to the domestic organization and (2) has some means for enforcing compliance with these orders. Furthermore, control will normally be accompanied by supervision and reporting to insure compliance with the orders. The Modified Report shows on its face that there is no evidence of any of these factors, at least subsequent to petitioner's disaffiliation from the Communist International in 1940.

B. The Absence of Foreign Control As Correctly Defined Appears From the Decision Below and the Modified Report.

First, the Modified Report cites no evidence that petitioner receives any orders from the Soviet Union. Abandoning the erroneous finding of the original Report (R. 146-47), it makes no finding that petitioner receives directives from abroad. In fact, the Modified Report cites no instance of a claimed Soviet directive to petitioner after petitioner's 1940 disaffiliation from the Communist International. The Modified Report does find (R. 2580) that petitioner "is still pursuing policies enunciated by the Soviet Union through the Communist International," which has been defunct since 1943. This, however, is nothing more than a finding of voluntary agreement, which, as we have seen, does not constitute control.

Second, there is no evidence of, and the Modified Report does not find, any means by which the Soviet Union could exact compliance with directives to petitioner, were it to give any. There is, of course, no showing or finding that

the Soviet Union can exercise physical or police power over petitioner. Neither is there a showing or finding of any other means by which the Soviet Union can or attempts to enforce conformity by petitioner to Soviet desires. If there were any evidence that the Soviet Union subsidizes petitioner, the withdrawal or threatened withdrawal of financial aid might supply a lever of control. The Modified Report itself acknowledges, however, "The record contains no evidence of substantial financial aid subsequent to 1940 and none after 1944" (R. 2596).[42] The court below likewise made no finding that the Soviet Union has any means of coercing petitioner, and it seems to have recognized that there is no evidence of any such means (Ops. 93-94).

Finally, the record contains no evidence that petitioner is supervised by or reports to the Soviet Union. The Modified Report cites no instance of reporting or supervision after 1945 at the latest. In fact, there is no competent evidence of either after petitioner's disaffiliation from the Communist International. (See *infra*, p. 119.)

Indeed, the Modified Report cites no significant contacts between petitioner and the Soviet Union after petitioner's disaffiliation from the Communist International in 1940. The only contacts after the disaffiliation were these: (1) In 1945, while on a trip to France, Elizabeth Gurley Flynn, a member of petitioner's National Committee, met some Russian women at an international women's conference and conversed with them about child care, post-war reconstruction, and the rights of women (R. 2605-06, 1298).[43] (2) In 1949, petitioner sent Stalin a telegram congratulating him on his 70th birthday and praising the Soviet

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[42] The only evidence to support the insinuation in the quoted sentence of some, though insubstantial, financial aid between 1940 and 1944, rests on testimony of Budenz which should have been stricken. See *infra*, pp. 128-39.

[43] The Modified Report finds that Mrs. Flynn's conversations abroad were not reports. By omission, however, it gives an inadequate and misleading account of the conversations. Cf. the evidence (R. 1298) with the account in the Modified Report (R. 2605).

Union (R. 2609-10). (3) In December 1950, the Communist Party of the Soviet Union sent a telegram of greetings to petitioner's national convention (R. 2611-12). (4) Petitioner's publications sometimes reprinted articles from Soviet publications, and its leaders and members sometimes read the publication of the now-defunct Communist Information Bureau (R. 2542). (5) The Daily Worker had a correspondent in Moscow (*ibid.*).

The fact that there were so few and such trivial contacts between petitioner and the Soviet Union over the ten-year period from 1940 to the administrative proceeding is a convincing demonstration that the Soviet Union does not direct, dominate or control petitioner. Nor can this fact be minimized by any claim that petitioner has concealed other contacts. For the Board itself expressly disclaimed making any finding that petitioner engages in secret practices in order to conceal foreign control (R. 2615 ftn. 116).

Moreover, petitioner's witnesses Gates and Flynn testified that during their tenure on petitioner's National Committee (since 1938 and 1946, respectively—R. 2650), there were no foreign representatives to petitioner, and petitioner received no foreign supervision or control (R. 1211-16, 1223-24; Tr. 15783-96).

The court below misconstrued the foreign control component by eliminating the essential ingredient of a means for exaction by the Soviet Union of compliance with its desires. The court stated in its second opinion (Ops. 93-94):

> "The words [of section 3 (3)] are 'substantially directed, dominated, or controlled.' The statute uses the word 'substantially.' An organization or a person may be substantially under the direction or domination of another person or organization by voluntary compliance as well as through compulsion. This is especially true if voluntary compliance is simultaneous in time with the direction and is undeviating over a period of time and under variations of direction. If the Soviet Union directs a line of policy and an organization voluntarily follows the direction, the terms of this statutory definition would be met."

For reasons already stated, this is an erroneous interpretation of the control component. But even this interpretation requires evidence that there were Soviet directives which petitioner could voluntarily follow. The Board, however, found none; the court below cited none; and, in fact, there is no evidence of any such directives since petitioner's disaffiliation from the Communist International In 1940.

In its third opinion the court below summarized the "major characteristics in the facts," as follows (Ops. 131):

> "But the facts beyond dispute are that there is a Communist Party in Europe, based upon Marxism-Leninism, and in power in Soviet Russia; that our present petitioner was for years a member of the Communist International, and its separation from that organization was not accompanied by a repudiation, either of objectives or of methods; that it is by its own choice named the Communist Party of the United States of America, a self-imposed description not to be ignored without reason; that it once forsook the line laid down by the Communist Party abroad but, upon being severely brought to task by a leading European Communist in an open letter to Communists, reorganized itself, even to the extent of expelling its erring leader, and went back to the line; and that, save for that period of waywardness, it has never differed from the program and policy of the Communist Party abroad and has always adhered to that program and policy even in sharp changes."

As can most readily be seen from the Summary of the Modified Report (R. 2642-44), the Board relied on the same factors.

The quoted passage demonstrates that the evidence does not satisfy the foreign-control component as correctly construed or even as misconstrued by the court. It rests on two propositions. The first, petitioner's relations with the Communist International prior to 1940 is irrevelant for reasons discussed *infra*, pp. 105-11. The second is that petitioner is an adherent of Marxism-Leninism and subscribes to Soviet policies. This shows only voluntary agree-

ment, which does not satisfy even the court's definition of control because the agreement was not occasioned by Soviet directives. The court itself likened petitioner to "one who attaches himself by intellectual affiliation to a cause" (Ops. 131). But intellectual attachment is plainly the antithesis of a control relationship.

II. The Board and the court below misapplied the objectives component of Section 3(3).

The second component of the section 3(3) definition is that an accused organization "operates primarily to advance the objectives of such world Communist movement as referred to in section 2." As we have seen, an initial difficulty in applying this component is the Act's failure to define the objectives referred to (*supra*, pp. 30-31). Nor was a definition attempted by either the Board or the court below. We suggested a definition to the court below, which accepted it arguendo (Ops. 94-95). This definition, in our view, is the one of the several possibilities which comes closest to satisfying the First Amendment requirement that the accused organization must be proved to be engaged in activities endangering the national security (see *supra*, pp. 30-32).[44]

Under our definition the objectives of the world Communist movement "as referred to in section 2" are: (a) the overthrow of all existing capitalist governments by espionage, sabotage, terrorism, or force and violence (secs. 2(1), (6)); (b) the establishment in all countries of "Communist totalitarian dictatorships" (secs. 2(1), (2), (3)) which (c) "will be subservient to the most powerful existing Communist totalitarian dictatorship" (secs. 2(1), (6)).[45]

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[44] Adoption of our definition would not, however, eliminate the other First Amendment defects of the Act.

[45] The element of subservience also appears from section 2(15) which states that the Act is required "to preserve the sovereignty of the United States as an independent nation," and from section 4(a) which is directed against the establishment in this country of a totalitarian dictatorship only if it is under foreign control.

Contrary to the court below (Ops. 94-95), the Board did not find, and could not have found from the evidence, that petitioner operates to advance these objectives.

1. Because of First Amendment considerations, an organization cannot be found to be advancing the first objective unless it engages in or incites illegal action. The Board did not and could not find that petitioner engages in or incites such action. It did find (R. 2633) that petitioner "advocates the overthrow of the Government of the United States by force and violence if necessary." But, as we have seen, this is a finding not of incitement, but of the advocacy of abstract doctrine; nor could the evidence have supported a finding of incitement. (See *supra*, p. 32.)

2. Section 2(2) spells out the second objective of the world Communist movement by describing "totalitarian dictatorship" as a form of government that "results in the suppression of all opposition to the party in power, the subordination of the rights of the individual to the state, the denial of fundamental rights and liberties which are characteristic of a representative form of government, such as freedom of speech, of the press, of assembly, and of religious worship, and results in the maintenance of control over the people through fear, terrorism and brutality." Section 3(15) defines "totalitarian dictatorship" in similar terms.

The Modified Report finds from its examination of Marxist writings that the primary objective of Communism is to supplant capitalist governments "by socialist states under dictatorships of the proletariat (working class), which we find is a dictatorship [*sic*] of a Communist party" (R. 2452, and see also R. 2507, 2509, 2642). The court below incorrectly held this to be a finding that it is petitioner's objective to establish a totalitarian dictatorship within the meaning of the Act (Ops. 94). In any event, a finding which equates a "dictatorship of the proletariat" with

the "totalitarian dictatorship" described in section 2, is contrary to the plain meaning of the texts on which the Board relied as well as to this Court's reading of the same texts. *Schneiderman v. United States*, 320 U. S. 118, 142, described the dictatorship of the proletariat as follows:

> "In the general sense the term may be taken to describe a state in which the workers or the masses, rather than the bourgeoisie or capitalists are the dominant class. Theoretically it is control by a class, not a dictatorship in the sense of absolute and total rule by one individual. So far as the record before us indicates, the concept is a fluid one, capable of adjustment to different conditions in different countries. There are only meager indications of the form the 'dictatorship' would take in this country. It does not appear that it would necessarily mean the end of representative government or the federal system."

The uncontradicted testimony of petitioner's witness Aptheker establishes that petitioner understands and uses the term dictatorship of the proletariat in the sense defined by the Court (R. 2443).

It is thus apparent that the term, as understood by the Court and petitioner, has nothing in common with the "totalitarian dictatorship" which section 2 postulates as an objective of the world Communist movement. Accordingly, if the Board found to the contrary, its finding is without evidentiary support.

3. The Modified Report does not find, and there is no evidence, that petitioner has the objective of establishing a government in this country that will be subservient to the Soviet Union. Moreover, the Modified Report seems to recognize that existing Communist governments outside of the Soviet Union are not Soviet puppets. For it finds that the governments of China and the Communist countries of Eastern Europe are "dictatorships of the proletariat controlled by a *national* Communist Party *in alliance with* the Soviet Union" (R. 2500, emphasis supplied, and see R. 2507).

III. The Board and the court below erroneously relied on evidence of conduct discontinued before enactment of the Act.

Sections 13(g) and (h) make it the duty of the Board to determine whether a respondent in a proceeding before it "is" or "is not" a Communist-action organization. Similarly, the definition of a Communist-action organization in section 3(3) and the evidentiary tests of section 13(e) are all phrased in the present tense. Accordingly, the issue before the Board was the current character of petitioner, i.e., whether or not it was a Communist-action organization at the time of the administrative proceeding, or, in any event, after September 23, 1950, the date of enactment of the Act.

The express terms of the Act are re-enforced by the principle favoring the prospective construction of legislation and by the constitutional prohibition of ex post facto laws. *White* v. *United States*, 191 U. S. 545, 552; *Shreveport* v. *Cole*, 129 U. S. 36; *Cummings* v. *Missouri*, 4 Wall. (71 U. S.) 277; *Ex Parte Garland*, 4 Wall. (71 U. S.) 333; *Pierce* v. *Carskadan*, 16 Wall. (83 U. S.) 284; *Burgess* v. *Salmon*, 97 U. S. 381.

The Board's order, therefore, must be supported by proof of relevant acts and practices of petitioner subsequent to the date of the Act. Evidence of petitioner's conduct prior to that date is relevant, if at all, only to the extent that it serves to interpret or explain the significance and purpose of relevant post-Act activities. The rule is "that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends to show the purpose or character of the particular transactions under inquiry." *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 705.[46]

[46] That case indicates, however, that evidence of past transactions is not admissible even for this limited purpose, where the effect of the proceedings is not to regulate future practices but, as in this case, "to punish or to fasten liability on respondents for past conduct" (p. 706).

Since the Board's order must be based on post-Act conduct the Board was required to show by its findings a basis for its order in post-Act evidence (Sec. 13(g)). This the Board failed to do. Instead, the Modified Report ranges over the entire thirty-three years of petitioner's history, indiscriminately commingling discussion of a few alleged contemporary practices with findings of alleged episodes of the remote past. The overwhelming mass of the Attorney General's evidence dealt with the period prior to the Act, for the most part prior to 1940.

Our examination of the 268 pages of the Second Modified Report (R. 2376-2644) shows that the only post-Act matters cited by the Board are the following:

1. Petitioner's constitution provides that "personal or political relations with enemies of the working class or the nation are incompatible with membership in the Communist Party" (R. 2535).

2. Petitioner currently has certain officers who held positions in the Communist International prior to 1940 and had visited, and in some cases studied, in the Soviet Union prior to 1940 (R. 2522-25).

3. The Daily Worker receives and prints news dispatches from abroad, including Moscow, and stations a correspondent in Moscow (R. 2542).

4. The newspaper of the Communist Information Bureau was purchased, read and discussed by some of petitioner's members (R. 2542).

5. A report to petitioner's 1950 convention warned against factionalism and said that renegacy from Communism inevitably leads the renegade to hostility towards the Soviet Union (R. 2535).

6. At a 1951 regional convention of petitioner, "considerable attention was devoted to the principle of industrial concentration, the necessity of infiltrating the trade unions" (R. 2567).

7. In 1951 petitioner expelled Warwick Thompkins (otherwise unidentified) for trying to get its members to distribute anti-Soviet leaflets (R. 2534).

8. Petitioner published statements which: (a) urged that the main direction of petitioner's trade-union work be among members of A. F. L. and C. I. O. unions (R. 2567-68); (b) approved formation of the Labor Youth League as part of the fight to win the youth and promote internationalism and peace (R. 2571-72); (c) commented favorably on the role and position of youth in the Soviet Union (R. 2572); (d) stated that the Negro people in the United States are an important source of strength to the working class in its struggle against reaction and for the ultimate establishment of socialism (R. 2577-78); (e) called upon its members to guard Party unity and maintain Party discipline (R. 2532); (f) stated that Lenin's teachings are triumphing because they are true (R. 2633).

9. Petitioner advanced views similar to those of the Soviet Union on certain questions of foreign policy, including advocacy of the admission of Communist China to the United Nations, opposition to the peace treaty with Japan, and advocacy of a cease-fire in Korea (R. 2581).

10. Petitioner engages in "secret practices," such as the reduction in the size of Party branches and committees, the discontinuance of membership cards and lists, etc. (R. 2613-31). The court below held, however, that the evidence did not support a finding that these practices were engaged in for either of the purposes specified in section 13(e)(7) (Ops. 73-74, 126).

11. Petitioner adheres to Marxism-Leninism, whose doctrines, according to the Board's reading of standard Communist works, include the tenets that capitalist governments must be overthrown by force and violence, if necessary, and that the Soviet Union has the role of leader of the world Communist movement (R. 2452-53, 2632).

12. According to the Modified Report, two witnesses (Evans and Janowitz) whose membership in petitioner extended beyond the date of the Act testified that petitioner advocates the overthrow of the government by violence, if necessary (R. 2633). In fact, neither witness so testified, expressly or impliedly. (See R. 1092-1114, testimony of Evans; R. 1016-24, testimony of Janowitz.)

This evidence is a mixture of absurdly irrelevant matters and petitioner's ideological adherence to Communism. Obviously it cannot establish that petitioner is a Communist-action organization as defined by the Act.

The opinion below and the Modified Report show on their face that the court below and the Board did not find against petitioner on the basis of this evidence of its current practices. They erroneously based their findings of foreign control on claimed practices of petitioner which were concededly discontinued at least ten years prior to enactment of the Act. This appears from the Summary of the Modified Report (R. 2642-44), whose dominant theme is as follows:

1. Petitioner, by joining and assuming the obligations of membership in the Communist International, thereby subjected itself to Soviet control.

2. Petitioner's disaffiliation from the Communist International in 1940 and the dissolution of the Communist International in 1943 were of no consequence because both the Soviet Union and petitioner continue to believe in and practice the principles of Communism.

3. Ergo, the Soviet control of petitioner which existed while petitioner was a member of the Communist International continues.

As the Board summarized its Summary (R. 2644):

> "The short of it is this * * * the Communist Party began its history by voluntarily submitting to the control of the Soviet Union and adopting that nation's international program for the Communist movement. The record shows that neither the basic

> program or objectives of the Soviet led world Communist movement nor those of [petitioner] have changed."

This theory was not visible in the original Report and was plagiarized from the first opinion of the court below (Ops. 63). The court adhered to the theory in its latest opinion when it emphasized that petitioner "was for years a member of the Communist International, and its separation from that organization was not accompanied by a repudiation, either of objectives or of methods" (Ops. 131).

This theory is palpably unsound. The question is whether petitioner is currently controlled by the Soviet Union. The Board and the court below start from the premise that prior to 1940 petitioner was controlled by the Soviet Union through the Communist International. If this was so, it was because members of the International who failed to conform to its decisions were liable to expulsion, a circumstance which might supply a means of control. Also, according to the Board's findings, the International subsidized petitioner (R. 2596), and hence the possible withdrawal of subsidies gave it another lever of control. Furthermore, according to the findings, the International not only could, but did, control petitioner, giving it directives which petitioner obeyed, requiring it to expel dissident members, supervising petitioner through foreign representatives, and receiving reports from petitioner (R. 2525-26, 2532-33, 2579, 2603-05).

But petitioner withdrew from the International in 1940, and the International dissolved in 1943. Petitioner could not be expelled from an organization to which it no longer belonged or which no longer existed. Possible withdrawal of financial aid could not be a lever of control because petitioner no longer received any. All manifestations of the exercise of control likewise ceased. There is no evidence that subsequent to the disaffiliation petitioner received foreign directives, disciplined its members at the behest of the

Soviet Union, reported to it, or was supervised by it. In fact, as we have seen (*supra*, pp. 99-100), after the disaffiliation there were no significant contacts or communications between petitioner and the Soviet Union. Hence, with and as a result of the disaffiliation from the International (not to mention the latter's dissolution), there disappeared all of the means and practices by which, according to the Board, the Soviet Union had controlled petitioner.

The fact that petitioner continued to have Communist views and programs did not continue the control. For the control depended on the existence of an apparatus which could enforce compliance, and the exercise of authority through this apparatus. Once petitioner's connection with the apparatus, later dismantled, had been severed, authority no longer was or could be exercised over petitioner. Therefore, there was no control. It is irrelevant that after the disaffiliation petitioner continued to adhere to its previous views and agreed with the Soviet Union's. For this adherence and agreement were by its voluntary choice, not a product of control.

Nor is it significant that petitioner disaffiliated from the International to avoid registration under the Voorhis Act and regarded the disaffiliation as a "friendly divorce" (R. 2514-15). Petitioner's motivation did not affect the fact or consequences of disaffiliation, and a friendly divorce effectively dissolves a marriage. Moreover, the divorce was followed by the death of the International in 1943.

It is clear, therefore, that the Board and the court below violated the *Cement Institute* rule (at 705) that "prior transactions" may be used only "to show the purpose and character of the particular transactions under inquiry." This rule assumes a showing of relevant current matters whose purpose and character are ambiguous and can be illuminated by reference to the past. In the present case, relevant current matter would be the existence of some means through which the Soviet Union could exercise con-

trol over petitioner or, at least, some instances in which the Soviet Union gave orders to petitioner. But there was no evidence of any semblance of Soviet orders to petitioner after 1940, much less of a possible means of enforcing compliance with orders. Hence there were no relevant current "transactions" to be explained by the abandoned practices. The fact is that the Board and the court below irrationally treated evidence of the termination of control in 1940 as proof of the existence of control in 1950.

The situation here is an aggravated version of that in *United States* v. *Oregon Medical Society*, 343 U. S. 326. There the Court reversed an anti-trust injunction, saying (at 334):

> "Striking the events prior to 1941 out of the Government's case, except for purposes of illustration or background information, little of substance is left. The case derived its coloration and support almost entirely from the abandoned practices."

IV. The Board and the court below misconstrued and misapplied Section 13(e).

A. "Non-Deviation," Sec. 13(e)(2).

We deal with this criterion first because the Board and the court below regarded "non-deviation" as "one of the chief items of evidence in the case" (Ops 71).

The Board's findings on the subject rest primarily on the testimony of the Attorney General's expert witness, Mosely (R. 2580). Mosely testified that petitioner and the Soviet Union held similar or "parallel" views on each of 44 different issues dealing exclusively with international relations and foreign affairs, and ranging in time and subject from the League of Nations in 1919 to the Korean War in

1950. With respect to each issue he identified documents which purportedly illustrated the asserted similarity or parallelism. (R. 2581.)

The Mosely testimony and exhibits had no tendency to prove "non-deviation" within the meaning of section 13(e)(2), and had no rational relation to the 3(3) definition of a Communist-action organization. In relying on this evidence, the Board and the court below committed three basic errors.

The Date-Sequence Error.

Mosely at no time testified that petitioner's views on the 44 issues to which he addressed himself did not "deviate" from those of the Soviet Union. Instead, he stated that the views of each were "parallel." (*E.g.*, R. 518, 520, 524.)

The Act, however, requires proof of "non-deviation." This is different from a parallelism or similarity of views. The definition of "deviation" is "variation from the common way, from an established standard, position, etc." *Webster's New International Dictionary.* Accordingly, deviation or non-deviation cannot occur unless there is a pre-existing "established standard, position, etc.," from which it is possible to deviate.

Applying this definition to section 13(e)(2), non-deviation can be proved only by showing (1) that the Soviet Union first established a position on a given issue; and (2) that thereafter petitioner, knowing of the Soviet position, did not "deviate" from it, but expressed a similar view or policy on the given issue.

Any contrary construction of section 13(e)(2) leads to an absurd result. A parallelism of ideas can have no conceivable relation to the issue of foreign control unless it appears that the alleged domestic agent adopted ideas pre-

viously enunciated by its alleged foreign principal.[47] It is impossible to infer foreign domination or control from a showing that the alleged domestic agent adopted its views before the alleged foreign principal adopted similar views.

Yet the indispensable element of chronological sequence is absent from the record. At no time did the Attorney General offer any evidence that the Soviet view on a subject dealt with by Mosely was adopted, much less communicated, prior to petitioner's adoption of a view on the same subject. As the Modified Report points out, the exhibits were introduced for their content alone, and were not intended to establish priority of the Soviet view (R. 2582).[48] Counsel for the Attorney General stated (R. 836):

> "As I am saying, we have not made any attempt to show how the Communist Party reached the views that it did. All we are attempting to show is that it reached the view."

Accordingly, the Mosely testimony establishes no more than the bare fact that the petitioner and the Soviet Union have held similar views on a number of international questions. There is nothing in his testimony on which to predicate a finding that the petitioner did not "deviate" from Soviet policies. Nor did the Board make any determination of the date sequence of the views in question inde-

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[47] The court below held that the non-deviation standard is relevant only to the foreign control component of section 3(3), and not to the objectives component (Ops. 45). Our discussion accepts this premise. If the standard is considered relevant to the objectives component, then the Board committed still another error by refusing to allow petitioner to prove that the views concerning which Mosely testified were calculated to promote the best interests of the United States (e. g., R. 839, 844, 861, 864), and therefore were not evidence that petitioner was promoting the seditious objectives described in section 2.

[48] This disclaimer was necessary because it appears from the face of the exhibits that in 28 out of the 44 issues dealt with by Mosely, the domestic exhibits antedated the foreign exhibits. See Tr. 10903.

pendently of Mosely's testimony. Instead, it relied on all of the examples testified to by Mosely indiscriminately. It did so despite the uncontradicted testimony of petitioner's witness, Gates, that petitioner has often taken positions in advance of the Soviet Union and has taken positions on many questions as to which the Soviet Union has never expressed a view (R. 1227).

In affirming the finding of the Board, the court below dismissed petitioner's contention that consideration of the date sequence of the views was required by the terms of section 13(e)(2) with the statement (Ops. 69) that, "The statutory phrase refers to identity or coincidence and not to chronological adoption." Accordingly, both the Board and the court below misconstrued section 13(e)(2) by substituting similarity of views for "non-deviation."

The Error of Disregarding the Truth, Reasonableness and General Acceptance of the Views.

If the "non-deviation" criterion is to have any possible relevance in establishing that a domestic organization is the agent of a foreign principal and operates to advance the policies of the latter, the application of the criterion must be confined to views and policies which are peculiarly characteristic of the alleged principal. For example, it would be absurd to infer from proof that two organizations oppose racial segregation that one is "dominated or controlled" by the other or operates "to advance the objectives" of the other. Yet the Board and the court below relied on views of this character in concluding that the evidence satisfied the "non-deviation" criterion.

The hearing panel precluded petitioner from proving that the views involved in Mosely's testimony were true, reasonable, or generally accepted by individuals and groups (including, in some instances, the United States government) concededly not under Soviet control or en-

gaged in promoting Soviet policies.[49] The Board affirmed this ruling (R. 2582), concurring in the position taken by the Attorney General (Tr. 8878) that "it does not matter whether the Soviet view on these issues which were raised were [*sic*] right or wrong, or whether the Soviet view was held by many people, by some people, or by all the people." The court below affirmed the finding of the Board on "non-deviation" without discussion of this question (Ops. 69, 71).

This application of the non-deviation criterion predicated the finding that petitioner is a seditious, foreign-controlled organization in part upon such entirely legitimate and widely held views as the need for a cease-fire in Korea, the desirability of the seating of the Peoples Republic of China in the U. N., and the belief that the Syngman Rhee regime was a corrupt dictatorship (R. 2586). It is plain that so applied the non-deviation test is wholly irrational.

The Error of Disregarding the Independent Origin of the Views.

At most, "non-deviation" supplies tenuous circumstantial evidence of the foreign control component of the section 3(3) definition. The fact that two people or organizations hold similar views in a particular field of thought may, and usually does, have nothing to do with domination by one over the other. The similarity may arise from the

[49] For example, these rulings were applied to the following views, among others: that there should be negotiations for a cease-fire in Korea (R. 864); that the Chiang Kai-shek regime was a corrupt dictatorship (R. 836-7); that the establishment of a second front in World War II was desirable (R. 844-45); that the League of Nations as originally organized promoted imperialist purposes (R. 839; Tr. 9063); that the Syngman Rhee government was a corrupt police state (R. 862-64). Citations are to exclusions on cross-examination. For renewal of the exclusionary rulings in petitioner's affirmative case, see R. 1274-75.

voluntary acceptance by each of a common premise. Thus all pacifists will oppose a particular war.

The hearing panel, however, precluded petitioner from proving that the similarity of views of petitioner and the Soviet Union on various international questions were attributable to the independent application by each of the premises and analytical approach supplied by Marxist principles.[50] Nevertheless, the Board then proceeded to reject petitioner's contention that the similarities between views of petitioner and those of the Soviet Union and Communists of other lands are attributable to the independent application by each of Marxist-Leninist principles. It did so on the ground that "the great weight of the evidence is to the contrary" (R. 2589-90).

The Board failed to state what this evidence was, and there is none. Worse, the Board concealed the fact that any lack of evidence by petitioner on this issue was the result of the panel's ruling excluding proof on the subject. Moreover, Mosely testified that he was unable to conclude from the similarities of the views of petitioner and the Soviet Union that the former had not arrived at its views independently. He regarded the exhibits introduced through him only as evidence of the views and reasoning expressed therein, "but not of the thought processes or political processes by which one or the other

[50] For example, petitioner's counsel asked Mosely whether petitioner's opposition to World War II at the time of its outbreak in 1939 was not based on Marxist concepts as to the cause and nature of wars and the distinction between just and unjust wars. Counsel for the Attorney General objected to the question as irrelevant, stating: "It does not make any difference how they arrived at the view as to the war" (R. 842). In the colloquy that followed, counsel for the petitioner addressed the following question to the panel chairman and received the following reply (R. 843): "Mr. Marcantonio: * * * In other words how [petitioner] came about reaching certain decisions and taking certain public positions on various issues is irrelevant? Mr. Brown: Yes, sir."

arrived at the position which he stated" (R. 837-38). The Board, however, ignored the expert's evaluation of his own testimony.

B. "Directives and Policies," Sec. 13(e)(1).

As we have seen (*supra*, p. 98), there was no evidence and the Board made no finding that petitioner received directives from the Soviet Union after its disaffiliation from the Communist International. Petitioner was therefore entitled to a favorable finding on the "directives" portion of the "directives and policies" standard. The Board, however, found that petitioner had received Soviet directives through the Communist International prior to 1940 (R. 2579-80), and erroneously used this finding to support its ultimate finding that petitioner is currently controlled by the Soviet Union (R. 2642-44).

On the "policies" portion of the standard, the Board found (R. 2580) that petitioner's "policies, programs, and activities regarding trade unions, youth, and national minorities have as their fundamental purpose to effectuate the policies of the Soviet Union and to further the world Communist movement." The subsidiary findings from which this is drawn show that it is based on nothing more than that petitioner and other Communist parties all consider it important to win the adherence of trade unionists, youth, and minority groups in order to achieve socialism (R. 2562-69). There is nothing to show that petitioner's programs in these areas have any purpose other than to promote its own objectives. The Board's conclusory finding is, therefore, unsupported.

C. "Financial Aid," Sec. 13(e)(3).

The Board did not and could not find that petitioner receives foreign aid. It found (R. 2596):

> "The record contains no evidence of substantial financial aid subsequent to 1940 and none after

1944.[51] However, the disappearance, so far as this record shows, of such assistance when respondent became a going organization does not detract from the probity of this evidence to show the character of the Party during the period in which the aid was rendered. And it is a tile in the mosaic."

Under the subsection, the Board should have considered that the absence of financial aid during the relevant period tended to negate foreign control. Instead the Board erroneously treated long discontinued aid as "a tile in the mosaic" of foreign control.

D. "Instruction and Training," Sec. 13(e)(4).

The Board found (R. 2602), "There is no credited evidence showing training of [petitioner's] members in the Soviet Union subsequent to the outbreak of World War II."[52]

On the Board's own statement, therefore, it should have found that the absence of evidence of current foreign training tended to negate foreign control. But as in the case of "financial aid," the Board failed to do so. Instead, after indulging in vaporous speculation as to the reasons for the termination of foreign training, it proceeded to base its ultimate finding in part upon a finding that there was such training prior to 1939 (R. 2602-03).

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[51] The reference to insubstantial financial aid between 1940 and 1944 is based on testimony of Budenz that a Moscow news agency supplied cable news dispatches free to the Intercontinent News, which relayed them to the Daily Worker at a nominal cost (R. 2591-92). As we later show (*infra*, pp. 128-39), the Board erred in failing to strike all of the Budenz testimony.

[52] In fact, the Report shows that the Board credited no evidence of foreign training by petitioner's members subsequent to 1936 (R. 2598).

E. "Reporting," Sec. 13(e)(5).

The Modified Report found (R. 2613) that petitioner "upon occasion reports to the Soviet Union and its representatives." This finding is contradicted by the Board's evidentiary findings on the subject.

The last instance of reporting cited by the Modified Report occurred in 1935 (R. 2604). In addition, the Modified Report contains an undated reference to reporting through Soviet agents in the United States (R. 2606). In the cross-referenced subsection on "Foreign Representatives in the United States," the only person found to have been a foreign representative after 1940 was Eisler, who is found to have been acting as such in 1945 (R. 2526-27). This finding obviously cannot support a finding of reporting after 1945. Nor can it support a finding of reporting up to 1945 because the evidence and findings fail to show that petitioner ever reported to Eisler. In fact there is no finding or evidence that Eisler did anything in his supposed capacity as a foreign representative. Finally, the reference to Eisler's status after 1940 is based on testimony of Budenz, which was not only thoroughly discredited on cross-examination (R. 1187-91), but should have been stricken for the reasons stated *infra*, pp. 128-39.[53]

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[53] The Modified Report's discussion of "reporting" also refers to a telegram sent by petitioner in 1949 to Stalin congratulating him on his 70th birthday. The Modified Report does not find that this was a "report," and from its text, as well as the testimony cited by the Board on its "significance," it clearly was not under any intelligible meaning of the term. (R. 2610-11.) The same discussion states that "by means unknown" the Frenchman, Duclos, in 1945 knew the contents of a letter written by Foster (R. 2606). There is no finding that this involved "reporting." Nor could such a finding have been made in view of the absence of any evidence as to how Duclos learned of the letter and the fact that the letter, addressed to petitioner's national committee, was a personal dissent by Foster from petitioner's policies (R. 2536; see A. G. Ex. 208).

F. "Discipline," Sec. 13(e)(6).

In applying this criterion, the Modified Report first quotes statements from a number of American and foreign Communists to the effect that Communist Parties place great emphasis on the need for internal unity and discipline, demand adherence to party decisions, and condemn factionalism and opportunism (R. 2528-32). Obviously, however, the fact that petitioner has a policy of strict internal discipline is no evidence that it or its members are under foreign discipline.

In an effort to show otherwise, the Modified Report (R. 2528) refers back to its prior discussion of "democratic centralism." The Board finds (R. 2431) that under this principle "all directing bodies of the Party shall be elected; that they give periodic reports to Party organizations; that there be strict Party discipline and the subordination of the minority to the majority; and that all decisions of higher bodies shall be absolutely binding on lower bodies and on all Party members." The Board finds that under this principle, as applied, authority flows from "the top of the movement" (R. 2529), meaning presumably, the Soviet Union. But none of the Marxist passages cited by the Board (R. 2431-34) bears out this conclusion. They indicate merely that democratic centralism operates *within an organization*. When petitioner was a member of the Communist International prior to 1940, democratic centralism, therefore, required it to accept decisions of the International. However, petitioner disaffiliated from the International in 1940, and the International dissolved in 1943. After 1940, therefore, petitioner was not obliged to accept International decisions, and after 1943 there was no international organization within which democratic centralism could operate.

Petitioner's constitution provides that its national convention is its highest governing body, and that between conventions the governing authority rests in its national committee (A. G. Ex. 374; R. 1698-1704). Petitioner's

witness Gates testified that petitioner is a self-governing organization which applies democratic centralism as its internal principle of organization (R. 1204-05, 1224). The Attorney General's witness Lautner corroborated this testimony, stating that democratic centralism "pertains to rules and regulations by which the Communist Party *governs itself*" (R. 965, emphasis added). There is no evidence to the contrary.

The Modified Report also cites "specific instances of disciplinary action" (R. 2532).

1. The Modified Report finds three occasions on which members of petitioner were expelled or otherwise disciplined on the initiative of the Communist International during the period of petitioner's affiliation with that organization. The most recent of these occurred in 1934. (R. 2532-33.) For reasons already stated, the submission to discipline of the International has no tendency to prove foreign discipline after petitioner's disaffiliation from that organization.

2. The Modified Report finds that in the early 1930's, several of petitioner's members performed missions in foreign countries on behalf of the Communist International (R. 2537). This is irrelevant for like reasons.

3. The Modified Report cites a statement by William Z. Foster, petitioner's chairman, that he would have faced expulsion in 1944 had he openly opposed the policies of petitioner's secretary, Earl Browder (R. 2536). It finds that in 1945, Browder and a number of his followers were expelled "for deviating from the true line of Marxism-Leninism" (R. 2533). It also finds that between 1939 and 1951 petitioner expelled a number of officers and members for refusing to accept its position on the Hitler-Stalin pact; "for political differences with the Party;" "for disagreeing with Party policies;" on untrue charges of being a police spy; and "for trying to organize Communist members to distribute [anti-Soviet] leaflets" (R. 2533-34). The

Report does not suggest that the Soviet Union had anything to do with any of these cases of internal discipline, and no such suggestion could be supported by the record.

4. The Modified Report alludes to the stringent criticism of the Titoist regime in Yugoslavia by the Communist Information Bureau and states that petitioner agreed with this criticism (R. 2544).

The alleged incidents which occurred during petitioner's membership in the Communist International sixteen or more years prior to the Act, the more recent scattered instances of internal discipline, and petitioner's agreement with the condemnation of Tito, cannot conceivably support the Board's finding that petitioner and its members are subject to Soviet discipline. Instead, the testimony of petitioner's witnesses that its leaders and members are not subject to and do not recognize the disciplinary power of any foreign government or organization (R. 1223-24) was uncontradicted.

G. "Secret Practices," Sec. 13(e)(7).

The original Report found, in the terms of this criterion, that petitioner engages in secret practices for the purposes of promoting its objectives and concealing foreign control (R. 117). The court below struck Board's finding as to purposes, as not supported by the evidence (Ops. 73-74). This had the effect of making the criterion wholly inapplicable, since section 13(e)(7) makes such practices significant only if engaged in for one or both of the described purposes.

The Board refused to accept the court's holding. The Modified Report found (R. 2631) that petitioner engages in secret practices "within the meaning of the Act, for the primary purposes of promoting its objectives and thereby to advance those of the world Communist movement." It did however disclaim any finding that petitioner engages in secret practices for the purpose of concealing foreign control (R. 2615 ftn. 116).

In its last review, the court below adhered to its previous conclusion, holding that the evidence did not support the finding of the Modified Report (Ops. 126). As the record stands, therefore, the registration order rests in part on an erroneous finding. For this reason alone the judgment below should be reversed (see *infra*, pp. 144-46). In any event, on the Board's own premises, application of the "secret practices" criterion lends no support to the ultimate finding of foreign control. The Board's disclaimer also establishes that the absence of evidence of foreign control cannot be attributed to concealment.

H. "Allegiance," Sec. 13(e)(8).

The Board's finding under this criterion rested on two bases:

(1) The Board found that petitioner advocates the overthrow of the government by force and violence "if necessary" to establish a dictatorship of the proletariat. This finding was based primarily on the Board's interpretation of writings of Marx, Engels, Lenin and Stalin, and on the conclusory testimony of informer witnesses of the Attorney General (R. 2632-33).[54] The Board held (R. 2635) that petitioner's adherence to this concept "is completely incompatible with, and the exact antithesis of, allegiance to the United States."

The Board's conclusion thus flies in the face of *Schneiderman* v. *United States*, 320 U. S. 118, in which the Court held, after a study of the same texts cited by the Board, that adherence to Marxism-Leninism is not inconsistent with attachment to the principles of the Constitution and being well-disposed toward the good order and happiness of the United States. And cf. *Nowak* v. *United States*, 356 U. S. 660.

[54] The Board also relied on the Smith Act convictions of a number of petitioner's leaders (R. 2635). Characteristically, however, it did not consider that Smith Act acquittals of other leaders were relevant (R. 2401).

The Board also relied on the Marxist-Leninist concepts of imperialism and just and unjust wars (R. 2640), and referred to petitioner's position that the Korean War was an unjust war on the part of the United States (R. 2641). The Marxist views of imperialism and just and unjust wars were, however, contained in the texts examined by *Schneiderman* (at 149-52).

(2) The only other basis for the Board's finding on "allegiance" consists of a hodge-podge of findings (R. 2636-40). Most of these relate to the pre-1940 period, when petitioner was affiliated with the Communist International. None of them deals with any post-Act matter. Aside from their remoteness, most of them have no perceptible relation to the subject of "allegiance" apart from the Board's erroneous conception that adherence to Marxism-Leninism and admiration for the Soviet Union *ipso facto* demonstrate disloyalty to the United States.

It thus appears from the Modified Report on its face that the Board misconstrued or misapplied each of the criteria of section 13(e). Since its order rests in part on findings under each criterion, a misconstruction or misapplication of any one of them requires setting aside of the Board's order (see *infra*, pp. 145-46).

V. The court below misconstrued and misapplied the Act's definition of "world Communist movement."

As we have seen (*supra*, pp. 57-58), the court below held that the findings of section 2 of the Act with reference to the existence and nature of a world Communist movement were conclusive upon the Board and the courts. Nevertheless it reviewed and sustained the finding of the Board that on the evidence, "there exists a world Communist movement, substantially as described in section 2 of the Act" (Ops. 61; R. 2509). This conclusion was based on the court's finding that there is a world Communist movement in the sense

that the various Communist parties throughout the world have a common outlook and work in their respective countries for the revolutionary attainment of a "classless, stateless society ruled by the proletariat of the world" (Ops. 60).

The movement found by the court below is palpably not *the* world Communist movement postulated in section 2 of the Act. The key characteristics of that movement are a highly centralized world-wide organization, rigid Soviet control, and use of violent and criminal means, if necessary. Thus sub-sections (1), (5) and (8) of section 2 describe the movement as operating, "through the medium of a world-wide Communist organization," of which the Communist parties of the various countries are "sections" and "affiliated constituent elements." Subsections (4) and (5) find that the control of the world Communist movement is vested in the "Communist dictatorship of a foreign country" through the medium of "action organizations" which are "sections of a world-wide Communist organization." And subsections (1) and (6) find that the world Communist movement employs espionage, sabotage, terrorism, treachery, violence and other unlawful means, if necessary.

Neither the court below nor the Board found, or could have found from the evidence, the existence of a movement having these characteristics. The only organization which was a "world-wide Communist organization" was the Communist International, dissolved in 1943.[55] In the absence

[55] The now-defunct Communist Information Bureau, mentioned by the court below (Ops. 60), was not, and was not found to be, the organization described in section 2. Its membership was not world-wide, but was confined to the Communist parties of eight European countries (R. 2487, 1592). It was not a centralized organization; as the Board's Original Report stated, and a witness for the Attorney General testified, it was a medium for "mutual consultation and voluntary coordination of action" among the member parties (R. 7; 937-38; 971). Moreover, the court below acknowledged (Ops. 65) that petitioner was not affiliated with the Communist Information Bureau, and the uncontradicted evidence shows that petitioner never had dealings with it (R. 1205-10, 1286-89).

of such an organization, there could be no Soviet control of the movement "through the medium" of the organization. Likewise the record contains no evidence or finding that the Soviet Union or its Communist Party controls the various Communist parties of the world. Finally, the record is devoid of evidence and findings of the means employed by the various Communist parties of the world to achieve their objectives.

VI. The order of the Board is not supported by the evidence.

Under section 14(a), the order of the Board must be supported by a preponderance of the evidence. The Modified Report and the opinions below show on their face that this evidentiary burden was not met for the following reasons:

(1) The evidence does not support a finding adverse to petitioner under the foreign control component of section 3(3) as properly construed, or even as misconstrued by the court below (*supra*, pp. 98-102).

(2) The evidence does not support a finding adverse to petitioner under the objectives component of section 3(3) (*supra*, pp. 102-04).

(3) There is no evidence that the practices described in section 13(e) are engaged in by petitioner (*supra*, pp. 111-24).

(4) There is no evidence that there is a world Communist movement which meets the description of section 2 (*supra*, pp. 124-26).

(5) The Board and the court below erroneously rested their decision on evidence of practices which terminated long before enactment of the Act and on petitioner's voluntary adherence to Communist principles and views (*supra*, pp. 105-11).

The proscription of petitioner without an evidentiary basis, if allowed to stand, will result in the condemnation of numerous other organizations and thousands of individuals. The Act contemplates that once petitioner is finally found to be a Communist-action organization, this determination is conclusive on organizations accused of being "fronts" or "infiltrated" and on individuals required to register themselves as members of petitioner. In issuing the first registration order against an organization accused of being a Communist-front, the Board held that "the prior determination by the Board that the Communist Party is a Communist action organization is conclusive and applicable in this proceeding without further proof." Report of the Board, *Rogers* v. *Labor Youth League*, Board Docket No. 102-53, Feb. 15, 1955, pp. 54-55. The Board has applied the same rule in all subsequent cases.

The case against petitioner rests not on evidence, but on environmental factors. The American people have been so thoroughly indoctrinated on the subject of Communism that most of them cannot—and others dare not—admit the possibility that the Communist Party of the United States is not a subversive Soviet agent. Nor can they admit that such a well-known, self-evident "fact" requires demonstration. So in the twelfth century it was clear to most people that the sun revolves around the earth. The preconceptions against petitioner were written into the Act, were applied by the Board, and were not surmounted by the court below.

PART THREE: OTHER GROUNDS FOR REVERSAL

I. The Board and the court below erred in refusing to strike all the testimony of the Attorney General's witness Budenz.

The Board and the court below refused to strike all of the testimony of the Attorney General's witness Louis Budenz when petitioner was deprived of the opportunity to cross-examine him with the aid of his prior statements on two key matters. This was an error which requires that the case be remanded for administrative redetermination on a record expurgated of Budenz' testimony.

At the original Board hearing in 1952, Budenz testified about two supposed incidents which are referred to in the litigation as the Starobin letter and the Weiner conversation. We describe this testimony *infra*, pp. 132, 135.

On cross-examination, Budenz stated that he had orally reported these incidents to the FBI (R. 1184-85, 1180-82). He conveyed the impression that no recording or transcription of any of his oral reports had been made. Objections interposed by the Attorney General and sustained by the Board precluded petitioner from exploring the matter further. (Tr. 14003-04, 14120-22.) Petitioner moved for the production of any FBI reports of interviews with Budenz concerning the Starobin letter and the Weiner conversation. The Attorney General objected to the motions, and the Board denied them. (R. 1184-85, 2277-78, 128.)

Following the remand by this Court, petitioner again moved the Board for the production of the FBI reports on the Starobin and Weiner matters or for their *in camera* inspection by the Board. Again the Board sustained objections interposed by the Attorney General. (R. 2187-89, 2217-18, 2225,) The court below initially affirmed this ruling on the ground that there did not appear to be any state-

ments[56] on the two matters in the possession of the FBI (Ops. 106-07), government counsel having so represented in their brief (Respondent's Brief Following Remand, pp. 18, 46). Thereafter, in response to a petition for rehearing filed by petitioner, the government disclosed for the first time that the FBI had in its possession disc recordings of a five-day interview with Budenz in 1945, which contained statements pertinent to the Starobin and Weiner matters (R. 2685-87). As a consequence, the court below ordered the production to petitioner of statements made by Budenz to the FBI concerning the two matters (Ops. 122-23).

In the Board proceedings that followed, statements by Budenz relating to the Starobin letter and the Weiner conversation were excerpted from the recorded interview and from FBI memoranda of later interviews and furnished to petitioner (R. 2387-89).[57] As we later show, these statements were inconsistent with and contradictory of his testimony. Petitioner therefore demanded that Budenz be recalled for cross-examination with the aid of these statements. Budenz' ill health made this impossible. Petitioner then moved to have all his testimony stricken because of his unavailability for cross-examination. The Board struck Budenz' testimony on the Starobin and Weiner matters but refused to strike anything else. (R. 2301-02, 2387-89.) The court below affirmed these rulings, Judge Bazelon dissenting on the ground that Budenz' unavailability required that all of his testimony be stricken (Ops. 128-29, 132).

As the court below held, and as respondent does not dispute, petitioner was entitled to cross-examine Budenz with the aid of statements made by him to the FBI on subjects concerning which he testified. Cf. *Jencks* v. *United States*,

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[56] As defined by 18 U. S. C. 3500, which was enacted after the conclusion of the proceedings before the Board on this Court's remand.

[57] The unexcised documents were made part of the record as sealed exhibits (Bd. Exs. 2, 5, 6, 7).

353 U. S. 657; 18 U. S. C. 3500. Petitioner's exercise of this right, initially denied by the Board, was prevented on the remand by Budenz' illness. The issue presented is what consequences flow from this deprivation of cross-examination.

Wigmore states the applicable principles as follows (*Evidence*, 3rd ed., sec. 1390, emphasis in original):

> "Where the witness' *death* or *lasting illness* would not have intervened to prevent cross-examination but for the *voluntary act* of the witness himself or the party offering him—as by a postponement or other interruption brought about immediately after direct examination, it seems clear that the direct testimony must be struck out * * *. But where the death or illness prevent cross-examination under such circumstances that *no responsibility of any sort* can be attributed either to the witness or to the party, it seems harsh measure to strike out all that has been obtained on direct examination. Principle requires in strictness nothing less. But the true solution would be to avoid any inflexible rule, and to leave it to the trial judge to admit the direct examination so far as the loss of cross-examination can be shown to him to be not in that instance a material loss. Courts differ in their treatment of this difficult situation; except that by general consensus, a cross-examination begun but unfinished suffices if its purposes have been substantially accomplished."[58]

These principles require that Budenz' testimony be stricken in its entirety for each of two reasons: (1) the Attorney General and the Board were responsible for depriving petitioner of the right to cross-examine Budenz with the assistance of his FBI statements; and (2) the deprivation was a material loss to petitioner.

It is clear, and the majority below did not dispute, that the Attorney General and the Board were responsible for

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[58] In addition to the cases cited by Wigmore, see *United States* v. *Malinsky*, 153 F. Supp. 321. This Court has never dealt with the subject.

the deprivation. First, the Attorney General's objections and the Board's rulings denied petitioner access to the statements at a time when the witness was available for cross-examination. Second, the Attorney General withheld the fact that the FBI had the statements in its possession until it was too late to recall Budenz.[59] Under Wigmore's rule (never mentioned by the majority below), these facts alone required that all of Budenz' testimony be stricken, without considering whether the deprivation of cross-examination was a material loss to petitioner.

In addition, the deprivation of petitioner's right to cross-examine Budenz with the aid of the prior statements was a material loss, which was not repaired by striking his testimony on the Starobin and Weiner matters. As the dissenting opinion pointed out (Ops. 132), "Without such cross-examination the Party is denied the right to show the extent, if any, to which the rest of Budenz' testimony is tainted." A showing of taint would have required the Board to downgrade or strike all of his testimony. *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115; *Mesarosh* v. *United States*, 352 U. S. 1. This might well have eliminated a number of important findings prejudicial to petitioner which were based on Budenz' testimony.[60]

The majority below held that cross-examination could not have established any taint because Budenz' testimony and prior statements on the Starobin and Weiner matters "bear a solid similarity in essentials and differ no more than truthful accounts under such conditions may well differ" (Ops. 128). This defeats the principle that "only the defense is adequately equipped to determine the effective

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[59] Budenz' health would have permitted his recall when petitioner renewed its motions for production of the statements after this Court's remand (R. 2187, 2191, 2225; Tr. 18122; Bd. Ex. 3-C).

[60] E.g., that petitioner received financial aid from the Soviet Union after petitioner's disaffiliation from the Communist International, and that Eisler was a Soviet representative to petitioner after the disaffiliation. (R. 2591-92, 2526-27).

use" of a witness' prior statement for the purpose of impeachment. *Jencks* v. *United States*, 353 U. S. 657, 688-89. Furthermore, the court's holding flies in the face of the facts, as appears from a comparison of the testimony and the statements.

The Weiner Conversation

Budenz testified that in 1939 he and Morris Childs came from Chicago to New York where they had a conversation with Weiner, then treasurer of the Communist Party, about securing funds for the Midwest Daily Record, of which Budenz was the editor. Childs asked Weiner "if he couldn't get some money from abroad."[61] Weiner replied that "we could normally, but the channels of communication abroad had been broken for the time being, and perhaps could be re-established so money could come" (R. 1124-25).

Budenz was first interviewed by the FBI for five days from December 6-12, 1945 (R. 2298). At that time he made several references to the financial problems of the Midwest Daily Record and spoke of making frequent trips to New York to raise money for it. Nevertheless, he did not mention the above or any other conversation with Weiner. To the contrary, he stated in answer to repeated questions that he had no knowledge or "indication" of the availability of Soviet or other foreign funds for the Communist Party or its publications. (R. 2358, 2361-64.)[62] When pressed by further questions as to the possibility of foreign sources for funds Budenz added:

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[61] Budenz testified that "abroad" meant "Moscow" (R. 1126).

[62] Budenz' remarks on this subject are summarized as follows in an FBI memorandum on the December, 1945 interview: "He said he had no indication of any 'Moscow money' being given to the Communist Party or to the 'Daily Worker'" (R. 2370). "He said he had no knowledge as to foreign or Soviet funds available to the Party" (R. 2371).

> "Now the only thing I think is indicative is Weiner's position because I can't see any reason, never did, for Weiner's being sort of a super, ahhh—*that's just surmise you understand.* You must be very careful on that. But I can't see why he's a super financial person. See, unless there's something." (R. 2364; emphasis supplied.)

Five months after this initial interview with the FBI, Budenz took the first step in the process of transforming his "surmise" concerning Weiner into a conversation indicating Soviet financial aid to petitioner. In an interview on May 22, 1946, he informed the FBI (R. 2366, 2343):

> "* * * that he could recall only one instance wherein it was indicated that the Soviet Union might be sending money to the United States for the purpose of aiding the Communists in disseminating propaganda. This instance occurred when Budenz was affiliated with the Daily Record, Communist organ in Chicago, Illinois. Budenz stated that his newspaper in Chicago was in extremely poor financial condition; that he went to New York to discuss the matter with Communist officials; that he met with Maurice Childs and William Weiner, on which occasion Childs said to Weiner, "Don't you soon expect a consignment from across the sea?" Weiner immediately changed the subject matter, indicating that he did not want to discuss the question of transmission of Soviet funds in the presence of Budenz, even though Budenz was a trusted Communist. Budenz concluded from the remark that was made that funds were actually being sent to this country at that time by the Soviet Union for propaganda purposes."

Of course, the inference expressed in this statement, drawn from Weiner's supposed effort to change the subject of the conversation, was not acceptable as evidence. Ten months later Budenz began to rectify this defect. On February 26, 1947, he "recalled" for the FBI a new version of the conversation, as follows: (R. 2371):

> "Childs suggested that Weiner try to get some money from Moscow to finance the paper. Weiner stated that he had temporarily lost his contacts in Moscow, hence, he could not do anything."

In this perfected version of the conversation, Weiner lost his reluctance to discuss Soviet financial aid in front of Budenz. Instead of changing the subject, Weiner buttoned it down.

In a later interview on July 13, 1950, Budenz gave the FBI still another version of the supposed Weiner conversation (R. 2367):

> "In regard to the transmission of funds between Russia, including the satellite countries, and the CP, USA, Budenz advised that he has no direct knowledge of such transmissions. However, he stated that he has always been under the impression that there was [sic] such transmissions as the Party needed much more money to carry on its operations than it could possibly raise from dues and its various fund drives * * *.
>
> "Further, that while he was in the Party, particularly during the time he was editor of the Mid-West Daily Record, in Chicago, he had a conversation with Weiner and Mort Childs, CP officials in Chicago at the time, in regard to funds and Childs asked that funds be advanced him by Weiner from the reserve fund and Weiner advised that he didn't have any at that time as his communication system had temporarily broken down. Budenz *took this to mean that* Weiner's source of supply was from foreign countries, particularly Russia." (Emphasis supplied)

In this statement, the conversation retained a comment by Weiner in place of his silence in the May 1946 version. But this time the comment lost most of the punch of the February 1947 account, because it was silent on the source of the funds, which Budenz had to supply by interpretation.

On taking the stand in this case, where Soviet financial aid to petitioner was a key issue, Budenz substantially adopted the most damaging of his mutually contradictory prior statements to the FBI—that of February 1947. Thus he had Weiner say that money normally was available from "abroad," meaning "Moscow." But he embellished this version by having Weiner add that "the channels of communication abroad * * * perhaps could be re-established so money could come."

The Starobin Letter

Budenz testified that in May 1945, before the Duclos article criticizing dissolution of the American Communist Party was known in this country (see *supra*, pp. 11-12), he hastily read part of a letter from Starobin, a Daily Worker correspondent at the United Nations Conference in San Francisco. The letter reported that Manuilsky, a Soviet delegate, had expressed indignation that petitioner had not criticized United States government officials more severely and had said that "the American Party should observe more carefully the guidance and the counsel of the French Communists."[63] (R. 1135-37, 1182.) The obvious inference from this testimony is that the Duclos article was a Soviet directive to petitioner, and the court below so regarded it in its first opinion (Ops. 66).

Budenz' first interview with the FBI in December, 1945, is completely inconsistent with this testimony, but contains the germ of his subsequent fabrication.

In that interview, Budenz was asked whether it was not a fact that petitioner reversed its policy of collaboration with the United States government during the second week of the San Francisco conference, when the United States

[63] Budenz testified that he regarded the Starobin letter as an important matter and that it was "fastened in his memory" (Tr. 14107, 14121).

delegation voted to admit Argentina into the United Nations (R. 2359). Budenz replied (R. 2360):

> "Well, whether that was the time or not, it was in San Francisco * * * and you see Fields and Starobin were in San Francisco, and it was clear from their dispatches—from their private communications sent from Starobin to us, which were very lengthy and disturbed, that we already were attacking the United States and that was pretty early, I should say."

After making this statement, Budenz agreed with the suggestion of the FBI agent conducting the interview that Starobin was not "a big enough man" to have been responsible for the reversal in petitioner's policy. The interview continued as follows (R. 2360):

> "Q. Do you think then that the instructions relative to this change of policy that Starobin and Fields must have received came from the Russian delegation? Oh, you said maybe Manuilsky, the Ukrainian delegate?[64] A. Sure, sure, I mean—after all, they got the atmosphere there. In fact I mentioned Manuilsky very much, because definitely he is a figure in the CI.
>
> "Q. He certainly is. A. He used to lay down the law like a general, you know, to his troops. He was there as the Ukranian President or something."

Thus, in his initial FBI interview, only eight months after the alleged event, Budenz had no knowledge of the origin of petitioner's change in policy. He simply acceded to the suggestion of the FBI agent that the proposal *might* have come from Manuilsky via Starobin. Five months later, however, Budenz began to manufacture a tale to

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[64] It should not be assumed from this question that there had been a reference to Manuilsky earlier in the interview. The examiner stated that the recording contained no such reference (Tr. 17708).

document this suggestion. An FBI report of an interview with him on May 22, 1946 states (R. 2365-66, 2343):

> "Budenz recalled that within a few days after the United Nations Conference on International Organization was convened at San Francisco, the Communist Party in this country reversed its policy completely with regard to the question of supporting the United States. Budenz advised that this reversal in policy, as evidenced so completely in the Daily Worker, was predicated upon receipt of a lengthy letter * * * by Joseph Starobin * * * In this letter * * * Starobin advised that 'the French comrades have the line and the support of the Soviet Union—and the French comrades blasted Stettinius and the United States Delegation, and therefore Starobin directed that the Party in this country should imediately blast Stettinius and the United States Delegation.' Bundenz stated that in this letter Starobin *inferred* that he and/or his associates at the Conference had conferred with Manuilsky regarding this question, and that the changed policy was predicated upon Manuilsky's instructions as well as on advice received from the French Communists at UNICO." (Emphasis supplied.)

In this version, the "French comrades" appear for the first time and are made the principal actors in the affair. Manuilsky's role is no longer a matter of pure speculation, as it was five months earlier, but is now "inferred" from an unspecified statement in Starobin's letter.

Six months later, in his first appearance before the House Committee on Un-American Activities, Budenz further improved his story. He there testified (R. 1184) that Starobin had written:

> "toward the end of the San Francisco conference, that the French Comrades, who were used largely to beat the Americans, asserted that there should be more of an attack upon Stettinius by the American Communists. He added that this was 'likewise the opinion of Comrade Manuilsky.'"

As in his May, 1946 version of the incident, the "French comrades" remain the principal source of the view that petitioner should launch an attack on United States policy. But Manuilsky's concurrence in this advice no longer rests on "inference." Budenz now invents documentation in the form of a direct quote from Starobin's letter.

Budenz again refashioned his story when he testified in this proceeding, giving it a twist to fit the issue before the Board. In its final version, the Starobin letter no longer quotes the "French comrades" as advising petitioner to attack U. S. policy. Instead, it is Manuilsky who is quoted as expressing indignation at the failure of petitioner to criticize the government and ordering it "to observe more carefully the guidance and the counsel of the French Communists" (R. 1137).

The foregoing review of the genesis and evolution of Budenz' stories concerning the Weiner conversation and the Starobin letter indicates not only that his testimony in this proceeding was false but also a process of fabrication. In the first stage of the process, at the December 1945 interview, the FBI evinced interest in evidence that petitioner was the recipient of Soviet financial aid and that petitioner's 1945 change in policy was in response to a Soviet directive. Budenz disclaimed knowledge of any such evidence and could do no more than indulge in unsupported conjecture as to its possible existence. At the second stage of the process, some months later, he "recalled" a conversation and a letter from the equivocal contents of which he "inferred" the facts which the FBI desired to establish. This was followed by a third stage in the process during which Budenz "recalled" several inconsistent variants of the conversation and the letter. At the fourth and final stage, when he took the witness stand in this case, he refashioned the conversation and the letter into flat admissions highly damaging to petitioner.

Contrary to the view of the majority below, the inference is almost inescapable that Budenz either concocted

his Starobin and Weiner testimony or is incapable of distinguishing fact from fantasy. In any event, petitioner might have established this by cross-examination with the aid of the statements. Petitioner suffered a material loss by being deprived of this opportunity (*supra*, p. 131). Under the Wigmore rule, therefore, all of Budenz' testimony should have been stricken even if the Attorney General and the Board had not been responsible for the deprivation.

II. The court below and the Board erred in refusing to require production of relevant prior statements of witnesses for the Attorney General.

A. The Gitlow Memoranda.

In 1940, Benjamin Gitlow gave the FBI a quantity of minutes of meetings of leading committees of petitioner and other documents which he had collected during his Party membership. He also prepared and gave the FBI memoranda which interpreted the documents (R. 2253-55, 2257). On direct examination as a witness for the Attorney General, Gitlow identified the documents and explained their contents and significance (R. 243-64; 1343-1421; Ops. 126). The Modified Report relies heavily on Gitlow's testimony and the documents for its findings concerning petitioner's relations with the Communist International.[65]

On cross-examination of Gitlow, petitioner moved for the production of the memoranda. The motion was denied (R. 2257-58, 128). After the remand by this Court, petitioner renewed its motion, which was again denied (R. 2191, 2225).

A majority of the court below, Judge Bazelon dissenting, affirmed this ruling in its second decision (Ops. 96-104,

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[65] E.g., the findings that the Communist International controlled petitioner (R. 2511-12), subsidized it (R. 2590-95), and supervised it through foreign representatives in this country (R. 2525-26).

121). It held that the Board had erred in denying petitioner's production motions, but that the error could not be assigned in the proceeding to review the Board's order. Citing *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 225-26, it ruled that petitioner's exclusive remedy was a motion for leave to adduce the memoranda as additional evidence pursuant to section 14(a) of the Act.

Although disagreeing with this ruling, petitioner promptly moved under section 14(a) for leave to adduce the Gitlow memoranda as additional evidence (R. 2681-85). The motion pointed out: (1) The court's earlier denial of a motion by petitioner under section 14(a), which sought reversal of the Board's refusal to order production of impeaching documentary evidence relating to another witness, had led petitioner to believe that the court did not consider such a motion available for that purpose. (2) The court had recognized that its ruling was a novel extension of the *Consolidated Edison* rule, and petitioner could not, therefore, have reasonably anticipated it. (3) Since the court had remanded the proceeding for other reasons, allowance of the motion would not materially delay ultimate disposition of the case.

The court denied petitioner's motion (Ops. 122), stating, "We adhere to the views expressed in our opinion promulgated January 9, 1958." But those views, as we have seen, were that petitioner was entitled to get the Gitlow memoranda by such a motion. Petitioner called this paradox to the attention of the court in its brief following the second remand (pp. 14-15) and asked for reconsideration of the earlier ruling. In its opinion of July 30, 1959, the court adhered to its position, but this time on the ground that "a litigant cannot cure procedural defects *nunc pro tunc* after an appellate court has passed upon his contentions in the matter" (Ops. 127).

The majority below clearly erred in both its rulings.

In *Consolidated Edison*, the Labor Board erroneously excluded rebuttal testimony tendered by an employer. The

case held that this error could not be availed of in the proceeding to review the Board's order, but only by a statutory motion for leave to adduce additional evidence.

Consolidated Edison is, we think, dubious. In any event, it does not apply to the facts of this case. For here petitioner sought to obtain documents for possible use on cross-examination, not to introduce additional testimony of its own witness. Cross-examination of an adversary's witness is not the introduction of additional evidence within any reasonable reading of section 14(a). Moreover, as the court below recognized, the administration of justice will be hampered by a rule which requires a motion for leave to adduce additional evidence to review every claimed denial of the right of cross-examination. Such a rule would necessitate multiple interlocutory appeals from the exclusionary rulings of administrative agencies operating under standard statutory review provisions. Accordingly, even if the *Consolidated Edison* rule were applicable here, the majority below, like the Eighth Circuit, should have held that the rule was satisfied by petitioner's assignment of the exclusionary ruling as error in the petition for review (R. 142). *Mississippi Valley Structural Steel Co.* v. *N. L. R. B.*, 145 F. 2d 664.

Even if the majority below had been right in insisting on the need for a separate motion for leave to adduce, it was inexcusable to deny such a motion when it was filed. As already stated, granting the motion would not have delayed the proceeding, which was being reopened anyway. Nor could petitioner have anticipated the court's novel extension of *Consolidated Edison*. The motion was not an attempted "*nunc pro tunc*" cure of procedural defects, as viewed by the court below. The motion was prospective only. Nor are we aware of any doctrine that procedural omissions may not be remedied so long as the case is still pending and the other side is not prejudiced. The interests of justice required correction of the Board's error, not the erection of artificial measures for preserving it.

B. Budenz' Statements to the FBI.[66]

As we have seen (*supra*, p. 129), the Attorney General first disclosed the existence of disc recordings of Budenz' 1945 interview with the FBI after petitioner had petitioned for a rehearing of the decision below of January 9, 1958. Petitioner then moved under section 14(a) for the production of so much of the recordings and FBI memoranda of subsequent interviews with Budenz as related to the subject matter of his testimony (R. 2681, 2688). The court below, Judge Bazelon dissenting, denied the motion except insofar as it related to statements of Budenz concerning the Starobin letter and the Weiner conversation (Ops. 122-23). The court later ruled in an explanatory memorandum, Judge Bazelon dissenting, that petitioner was not entitled to statements concerning other matters on which Budenz had testified because it had not moved for their production at the original hearing and because the "blanket demand" made in its 14(a) motion was "a fishing expedition" and untimely (R. 2696-97).

The court below was wrong on all three counts.

(1) Before Budenz' appearance at the original hearing, the Board denied petitioner's motions for the prior statements of two other witnesses. These rulings were based on the erroneous premise that a witness' prior statements were producible only if it were first shown that they were inconsistent with his testimony.[67] Bowing to this ruling,

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[66] The point raised in this subsection requires decision only if the Court disagrees with our argument that all of Budenz' testimony must be stricken because of the deprivation of petitioner's right to cross-examine him (*supra*, pp. 128-39).

[67] The Board's doctrine was first adopted in its ruling denying petitioner's motion for the production of the memoranda of Gitlow, the first witness called by the Attorney General (R. 2255-57, 128; Tr. 2886). Thereafter, and before Budenz' appearance on the stand, the Board issued a written opinion repeating its doctrine in denying another production motion (Tr. 12659-60).

petitioner confined its subsequent production motions to situations in which, it contended, such a showing had been made. It was on this ground that petitioner moved for Budenz' statements on the Starobin and Weiner matters (R. 1184-85, 2275; Tr. 14076-80).

On these facts, it was error for the majority below to hold that petitioner was not entitled to prior statements of Budenz on other subjects because it had not moved for their production at the original hearing. The Board had already established a principle under which such motions would have been denied if made. Obviously petitioner was not obliged to make futile motions.

(2). Petitioner's motion under section 14(a) for all prior statements relating to the subject matter of Budenz' testimony was not a "fishing expedition," but conformed to the procedure specified in 18 U. S. C. 3500, and contemplated in *Jencks* v. *United States*, 353 U. S. 657.

(3) As Judge Bazelon held (R. 2696-97), and as the record discloses (R. 2688-92), Budenz' testimony at the original hearing, the action of the Board in cutting off cross-examination, and representations made by the government to the court below, had misled petitioner into believing that there were no verbatim transcriptions of FBI interviews with Budenz. Since petitioner moved for the relevant portions of the transcriptions as soon as it learned of their existence, its motion was not untimely.[68]

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[68] Budenz' unavailability at the time of the last Board hearing does not moot the question under discussion. He may have recovered sufficiently to take the stand by the time the case gets back to the Board. If not, the Board, consistently with its ruling on the Weiner and Starobin matters (*supra*, p. 129), will be required to strike Budenz' testimony on all subjects to which the prior statements relate.

C. Other Statements to the FBI by Witnesses for the Attorney General.

In its decision of January 9, 1958, modified on April 11, 1958, the court below held (Ops. 111, 123) that the principles of *Jencks* v. *United States, supra*, and 18 U. S. C. 3500 were applicable to proceedings before the Board. Accordingly, after the case had been remanded to the Board by the court below, petitioner moved for the production of all statements as defined in 18 U. S. C. 3500, which had been made by witnesses for the Attorney General and which related to the subject matter of their testimony (R. 2338). After the Board denied the motion (R. 2346-47), petitioner sought production of the statements by a motion in the court below for leave to adduce them as additional evidence pursuant to section 14(a) (R. 2697).[69]

The court below denied the motion, stating (Ops. 127-28), "The motion comes too late, and in any event it is not supported by any authority," and that the *Jencks* case disapproved "fishing expeditions." These are the same grounds on which the court refused to order production of the Budenz statements and which, as we have shown, are fallacious.

III. The court below, having stricken a key finding of the Board, erred in not remanding the case for administrative redetermination.

One of the eight criteria of a Communist-action organization is the organization's use of secret practices "for the purpose of concealing foreign direction, domination, or control, or of expediting or promoting its objectives" (sec. 13(e)(7)). The Board in its original Report found that petitioner engaged in secret practices for both of the stated purposes (R. 117). In the first decision below, the court struck the purpose findings as not supported by the evi-

[69] Petitioner's brief in the court below also assigned the Board's ruling as error. The motion was filed because of the court's prior erroneous ruling that a motion was the only available remedy (*supra*, pp. 140-41).

dence (Ops. 73-74). This holding made the subsection inapplicable. Nevertheless, the court affirmed the order of the Board.[70]

The Modified Report, issued by the Board after the first remand, eliminated the original finding that one of the purposes of the secret practices was concealment of foreign control (R. 2615 ftn. 116). However, it retained the other purpose finding stricken by the court below, namely, that the secret practices were engaged in for the purpose of promoting petitioner's objectives (R. 2631). The court below in its latest opinion adhered to its former ruling that this purpose finding was unsupported by the evidence (Ops. 126). Nevertheless the court affirmed the Board's order, Judge Bazelon dissenting (Ops. 132).

The importance of the secrecy finding is clear. It relates to one of the eight standards of section 13(e). The Board devoted to it nineteen pages of the Modified Report (R. 2613-31). It is also the only one of the 13(e) standards concerning which there was any substantial amount of evidence of post-Act practices. The importance attached to the subject by the Board further appears from its retention of the finding after the court below held it unsupported by the evidence. And even then the Board refrained from stating that this doubtful finding was not essential to the result.

It was error for the court below to affirm the order of the Board while setting aside one of the major findings on which the order was based. The court's action violated section 14 of the Act, which permits affirmance of a registration order only if the *findings* of the Board are supported by a preponderance of the evidence. The decision also violated the principle that, "The grounds upon

[70] One of the questions on which certiorari was granted in this case in 1954 was whether the court below erred in failing to remand the proceeding after striking the secret practices finding. Petition in No. 718, Oct. Term 1954, p. 3.

which an administrative order must be judged are those upon which the record discloses that its action was based." *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80, 87. As further stated in *Chenery*:

> "The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act." (At 94.)
>
> "We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." (At 95.)

See also, *I. C. C.* v. *C. B. & Q. R. R.*, 186 U. S. 320, 341; *Colorado Wyoming Gas Co.* v. *F. P. C.*, 324 U. S. 626, 634; *Atchison Ry.* v. *United States*, 295 U. S. 193, 201-03; *F. P. C.* v. *Idaho Power Co.*, 344 U. S. 17, 20.

The decision below contravenes *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469. There the Court remanded an administrative order because the agency's ultimate conclusion rested on findings which had insufficient evidentiary support. The Court recognized that the agency might validly have reached the same ultimate conclusion by making other findings supportable by the record before it. Nevertheless it remanded the case for agency redetermination.

The majority below justified its failure to remand on the ground that "the Board is entitled to adhere to its view on the point until our view of it has been tested in the Supreme Court" (Ops. 126). Thus the court failed to exercise its statutory duty of review and violated the rules of *Chenery* and *Virginia Electric & Power Co.*, which laid down principles to be followed by the Courts of Appeals as well as by the Supreme Court.

Conclusion

If the judgment below is sustained, the immediate effect will be to outlaw petitioner and to lay the foundation for criminal prosecutions against petitioner's officers and members. This will be the first time in our history that the Communist Party or any other political organization has been outlawed by federal legislation. Yet Marxist groups and parties have been active in this country since the middle of the last century,[71] and petitioner has existed as a legal political party since 1919.

No other major democracy outlaws its Communist Party. Only the Congress of the United States asserts that such a measure is necessary for the national safety or compatible with its institutions. Validation of the Act would give notice to the world that America has lost faith in the democratic process and confidence in its Bill of Rights.

The proscription of the Communist Party will also deeply affect non-Communists. The Board has already ordered thirteen organizations to register as "Communist-fronts," and has pending before it a case charging an international labor union as an "infiltrated" organization. The alleged "fronts" include two schools for social studies and groups promoting such causes as civil liberties, Soviet-American amity, the interests of the foreign born, economic

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[71] American Marxists helped form the Republican Party, backed Lincoln's candidacy in 1860, made significant contributions to the cause of the Union in the Civil War, helped form the first national federation of American trade unions, and played a leading role in organizing the American Federation of Labor. See R. 1262-65, 1270-71; Gompers, *Seventy Years of Life and Labor* (N. Y. 1925) v. 1, 51-60. Marx once observed, "Socialism and Communism did not originate in Germany, but in England, France and North America." *Selected Essays* (N. Y. 1926) 140.

security for the aged, and the defense of individuals charged under the Smith Act.[72].

The number of "front" and "infiltrated" organizations can be readily multiplied in the light of the comprehensive criteria of sections 13(f) and 13(A)(e).[73] Moreover, if the present categories of condemned organizations turn out to be too restricted, new ones can be created. Having moved from "action" and "front" organizations to "infiltrated" organizations, the Act could next be extended to groups which are "contaminated" and, finally" "politically unreliable."

Thus a vast number of organizations will be at the mercy of governmental displeasure if the Act is held valid.

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[72] The organizations ordered to register as "fronts" are Jefferson School of Social Science, California Labor School, Civil Rights Congress, National Council of American-Soviet Friendship, Veterans of the Abraham Lincoln Brigade, United May Day Committee, Washington Pension Union, Labor Youth League, American Peace Crusade, Colorado Committee to Protect Civil Liberties, Connecticut Volunteers for Civil Rights, California Emergency Defense Committee, American Committee for Protection of the Foreign Born. The pending "infiltrated" case is against the International Union of Mine, Mill and Smelter Workers.

[73] An illustration of these criteria in operation is supplied by the following typical allegation made by the Attorney General in a petition to require an organization to register as a front: "The Committee supported the views, policies and objectives of the Communist Party by opposing the enactment of certain legislation regarded by the Party as inimical to its interests, such as the Mundt-Nixon Bill, the Hobbs Bill, and the Internal Security Act of 1950." Par. III(4)(c) of Amended Petition in *Rogers* v. *American Committee for Protection of Foreign Born*, Docket No. 109-53, Subversive Activities Control Board. In another case, the gravamen of the Board's findings in support of a registration order was that the organization "came into existence at Denver, Colorado, in the fall of 1954, that it was created by the Communist Party to raise defense and bail funds for the Colorado seven and to mobilize public opinion for them and against the Smith Act and prosecutions thereunder." Report of the Board, p. 17, in *Rogers* v. *Colorado Committee to Protect Civil Liberties*, Board Docket No. 120-57.

For if the Constitution is held to authorize the premises which underlie the condemnation of petitioner, there will remain little room for constitutional objections to application of the Act to other organizations. And the techniques and interpretations of the Act used against petitioner by the Board and the court below, if sustained, can be applied so as to destroy virtually any group whose views are not officially approved.

If the order of the Board becomes final, the civil sanctions and criminal penalties which the Act imposes on petitioner's members will be extended far beyond those who are its members by any conventional or rational standards, in view of the all-embracing criteria of section 5 of the Communist Control Act. Worse, the order will have a disastrous effect on freedom of association and expression. As the President said in his veto message (H. R. Doc. 708, 81st Cong., 2d Sess., pp. 6-7):

> "Obviously, if this law were on the statute books, the part of prudence would be to avoid saying anything that might be construed by someone as not deviating sufficiently from the current Communist-propaganda line. And since no one could be sure in advance what views were safe to express, the inevitable tendency would be to express no views on controversial subjects."

The events of recent years have once more demonstrated the historic lesson that repression cannot be contained. What began as a drive against Communists inexorably led to the victimization of thousands of non-Communists, who were persecuted, dismissed from their jobs, blacklisted, ostracized, barred from public platforms, deported, denied the right to leave or enter the country, and otherwise persecuted. A climate of fear was created, and America's international reputation was seriously impaired.

The justification advanced for the Act is that it is needed to protect the national security against the menace of Communism. The fact is that the Act is a supreme example

of the truth of the statement that "Security is like liberty, in that many are the crimes committed in its name." *Knauff v. Shaughnessy*, 338 U. S. 537, 551. The Act does not protect, but undermines, the national security. It destroys the values most essential to be secured and on which our true security rests. As applied in this case, the Act suppresses peaceable advocacy and assembly, imputes guilt for association and belief, coerces self-incrimination, condemns by legislative fiat, compels trial before a biased tribunal, and authorizes judgment on the basis of irrational and vague standards. If these execrable techniques, so recently condemned both at home and abroad as "McCarthyism," may lawfully be applied to petitioner, they will inevitably be extended to the people as a whole.

The Act was enacted in the summer of 1950, when "the Western world as a whole believed that Korea was the opening campaign of the third world war." Walter Lippman, N. Y. Herald Tribune, Nov. 11, 1952. Even under such circumstances, the Act's wholesale sacrifice of civil liberties would not have advanced the national security. On the contrary, as President Truman stated in his veto message, it is the registration provisions of the Act which "represent a clear and present danger to our institutions" (H. R. Doc. 708, *supra*, at p. 5).

Moreover, events have disproved the accuracy of the political estimate which fathered the Act. The order of the Board is already an anachronism. To sustain it would vainly surrender our heritage of freedom and forfeit the respect and confidence of the peoples of the world.

The judgment below should be reversed.

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APPENDIX: STATUTES INVOLVED

Subversive Activities Control Act

The Internal Security Act of 1950, 64 Stat. 987, 50 U. S. C. 781 ff., as amended, provides in part as follows:

An Act

To protect the United States against certain un-American and subversive activities by requiring registration of Communist organizations, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America and Congress assembled, That this Act may be cited as the "Internal Security Act of 1950".

TITLE I—SUBVERSIVE ACTIVITIES CONTROL

Section 1. (a) This title may be cited as the "Subversive Activities Control Act of 1950."

(b) Nothing in this Act shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated hereunder having that effect.

Necessity for Legislation

Sec. 2. As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress hereby finds that—

(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration

into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.

(2) The establishment of a totalitarian dictatorship in any country results in the suppression of all opposition to the party in power, the subordination of the rights of individuals to the state, the denial of fundamental rights and liberties which are characteristic of a representative form of government, such as freedom of speech, of the press, of assembly, and of religious worship, and results in the maintenance of control over the people through fear, terrorism, and brutality.

(3) The system of government known as a totalitarian dictatorship is characterized by the existence of a single political party, organized on a dictatorial basis, and by substantial identity between such party and its policies and the government and governmental policies of the country in which it exists.

(4) The direction and control of the world Communist movement is vested in and exercised by the Communist dictatorship of a foreign country.

(5) The Communist dictatorship of such foreign country, in exercising such direction and control and in furthering the purpose of the world Communist movement, establishes or causes the establishment of, and utilizes, in various countries, action organizations which are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country.

(6) The Communist action organizations so established and utilized in various countries, acting under such control, direction, and discipline, endeavor to carry out the objective of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship. Although such organizations usually designate themselves as political parties, they are in fact constituent elements of the world-wide Communist movement and promote the objectives of such movement by conspiratorial and coercive tactics, instead of through the democratic processes of a free elective system or through the freedom-preserving means employed by a political party which operates as an agency by which people govern themselves.

(7) In carrying on the activities referred to in paragraph (6), such Communist organizations in various countries are organized on a secret, conspiratorial basis and operate to a substantial extent through organizations, commonly known as "Communist fronts", which in most instances are created and maintained, or used, in such manner as to conceal the facts as to their true character and purposes and their membership. One result of this method of operation is that such affiliated organizations are able to obtain financial and other support from persons who would not extend such support if they knew the true purposes of, and the actual nature of the control and influence exerted upon, such "Communist fronts".

(8) Due to the nature and scope of the world Communist movement, with the existence of affiliated

constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement.

(9 In the United States those individuals who knowingly and willfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement.

(10) In pursuance of communism's stated objectives, the most powerful existing Communist dictatorship has, by the methods referred to above, already caused the establishment in numerous foreign countries of Communist totalitarian dictatorships, and threatens to establish similar dictatorships in still other countries.

(11) The agents of communism have devised clever and ruthless espionage and sabotage tactics which are carried out in many instances in form or manner successfully evasive of existing law.

(12) The Communist network in the United States is inspired and controlled in large part by foreign agents who are sent into the United States ostensibly as attaches of foreign legations, affiliates of international organizations, members of trading commissions, and in similar capacities, but who use their diplomatic or semi-diplomatic status as a shield behind which to engage in activities prejudicial to the public security.

(13) There are, under our present immigration laws, numerous aliens who have been found to be

deportable, many of whom are in the subversive, criminal, or immoral classes who are free to roam the country at will without supervision or control.

(14) One device for infiltration by Communists is by procuring naturalization for disloyal aliens who use their citizenship as a badge for admission into the fabric of our society.

(15) The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States.

DEFINITIONS

SEC. 3. For the purposes of this title—

(1) The term "person" means an individual or an organization.

(2) The term "organization" means an organization, corporation, company, partnership, association, trust foundation, or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together for joint action on any subject or subjects.

(3) The term "Communist-action organization" means—

(a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title; and

(b) any section, branch, fraction, or cell of any organization defined in subparagraph (a) of his paragraph which has not complied with the registration requirements of this title.

(4) The term "Communist-front organization" means any organization in the United States (other than a Communist-action organization as defined in paragraph (3) of this section) which (A) is substantially directed, dominated, or controlled by a Communist-action organization, and (B) is primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement referred to in section 2 of this title.

(4A) The term "Communist-infiltrated organization" means any organization in the United States (other than a Communist-action organization or a Communist-front organization) which (A) is substantially directed, dominated, or controlled by an individual or individuals who are, or who within three years have been actively engaged in, giving aid or support to a Communist-action organization, a Communist foreign government, or the world Communist movement referred to in section 2 of this title, and (B) is serving, or within three years has served, as a means for (i) the giving of aid or support to any such organization, government, or movement, or (ii) the impairment of the military strength of the United States or its industrial capacity to furnish logistical or other material support required by its Armed Forces: *Provided, however*, That any labor organization which is an affiliate in good standing of a national federation or other labor organization whose policies and activities have been directed to opposing Communist organizations, any Communist foreign government, or the world Communist movement, shall be presumed prima facie not to be a "Communist-infiltrated organization."[1]

(5) The term "Communist organization" means any Communist-action organization, Communist-front organization, or Communist-infiltrated organization.[2]

(6) The term "to contribute funds or services" includes the rendering of any personal service and the making of any gift, subscription, loan, advance, or deposit, of money or of anything of value, and also the making of any contract, promise, or agreement to contribute funds or services, whether or not legally enforcible.

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[1] Added by sec. 7(a) of the Communist Control Act of 1954, 68 Stat. 777.

[2] As amended by sec. 7(b) of the Communist Control Act of 1954, 68 Stat. 778.

(7) The term "facility" means any plant, factory or other manufacturing, producing or service establishment, airport, airport facility, vessel, pier, water-front facility, mine, railroad, public utility, laboratory, station, or other establishment or facility, or any part, division, or department of any of the foregoing. The term "defense facility" means any facility designated and proclaimed by the Secretary of Defense pursuant to section 5(b) of this title and included on the list published and currently in effect under such subsection, and which is in compliance with the provisions of such subsection respecting the posting of notice of such designation.

(8) The term "publication" means any circular, newspaper, periodical, pamphlet, book, letter, post card, leaflet, or other publication.

(9) The term "United States", when used in a geographical sense, includes the several States, Territories and possessions of the United States, the District of Columbia, and the Canal Zone.

(10) The term "interstate or foreign commerce" means trade, traffic, commerce, transportation, or communication (A) between any State, Territory, or possession of the United States (including the Canal Zone), or the District of Columbia, and any place outside thereof, or (B) within any territory or possession of the United States (including the Canal Zone), or within the District of Columbia.

(11) The term "Board" means the Subversive Activities Control Board created by section 12 of this title.

(12) The term "final order of the Board" means an order issued by the Board under section 13 of this title, which has become final as provided in section 14 of this title.

(13) The term "advocates" includes advises, recommends, furthers by overt act, and admits belief in; and the giving, loaning, or promising of support or of money or anything of value to be used for advocating any doctrine shall be deemed to constitute the advocating of such doctrine.

(14) The term "world communism" means a revolutionary movement, the purpose of which is to establish eventually a Communist totalitarian dictatorship in any or all the countries of the world through the medium of an internationally coordinated Communist movement.

(15) The terms "totalitarian dictatorship" and "totalitarianism" mean and refer to systems of government not representative in fact, characterized by (A) the existence of a single political party, organized on a dictatorial basis, with so close an indentity between such party and its policies and the governmental policies of the country in which it exists, that the party and the government constitute an indistinguishable unit, and (B) the forcible suppression of opposition to such party.

(16) The term "doctrine" includes, but is not limited to policies, practices, purposes, aims, or procedures.

(17) The giving, loaning, or promising of support or of money or any other thing of value for any purpose to any organization shall be conclusively presumed to constitute affiliation therewith; but nothing in this paragraph shall be construed as an exclusive definition of affiliation.

(18) "Advocating the economic, international, and governmental doctrines of world communism" means advocating the establishment of a totalitarian Communist dictatorship in any or all of the countries of the world through the medium of an internationally coordinated Communist movement.

(19) "Advocating the economic and governmental doctrines of any other form of totalitarianism" means advocating the establishment of totalitarianism (other than world communism) and includes, but is not limited to, advocating the economic and governmental doctrines of fascism and nazism.

CERTAIN PROHIBITED ACTS

SEC. 4. (a) It shall be unlawful for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship, as defined in paragraph (15) of section 3 of this title, the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization, or foreign individual: *Provided, however,* That this subsection shall not apply to the proposal of a constitutional amendment.

(b) It shall be unlawful for any officer or employee of the United States or of any department or agency thereof, or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, to communicate in any manner or by any means, to any other person whom such officer or employee knows or has reason to believe to be an agent or representative of any foreign government or an officer or member of any Communist organization as defined in paragraph (5) of section 3 of this title, any information of a kind which shall have been classified by the President (or by the head of any such department, agency, or corporation with the approval of the President) as affecting the security of the United States, knowing or having reason to know that such information has been so classified, unless such officer or employee shall have been specifically authorized by the President, or by the head of the department

agency, or corporation by which this officer or employee is employed, to make such disclosure of such information.

(c) It shall be unlawful for any agent or representative of any foreign government, or any officer or member of any Communist organization as defined in paragraph (5) of section 3 of this title, knowingly to obtain or receive, or attempt to obtain or receive, directly or indirectly, from any officer or employee of the United States or of any department or agency thereof or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, any information of a kind which shall have been classified by the President (or by the head of any such department, agency, or corporation with the approval of the President) as affecting the security of the United States, unless special authorization for such communication shall first have been obtained from the head of the department, agency, or corporation having custody of or control over such information.

(d) Any person who violates any provision of this section shall, upon conviction thereof, be punished by a fine of not more than $10,000, or imprisonment for not more than ten years, or by both such fine and such imprisonment, and shall, moreover, be thereafter ineligible to hold any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

(e) Any person may be prosecuted, tried, and punished for any violation of this section at any time within ten years after the commission of such offense, notwithstanding the provisions of any other statute of limitations: *Provided*, That if at the time of the commission of the offense such person is an officer or employee of the United States or of any department or agency thereof, or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency

thereof, such person may be prosecuted, tried, and punished for any violation of this section at any time within ten years after such person has ceased to be employed as such officer or employee.

(f) Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 7 or section 8 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute.

EMPLOYMENT OF MEMBERS OF COMMUNIST ORGANIZATIONS

SEC. 5. (a) When a Communist organization, as defined in paragraph (5) of section 3 of this title, is registered or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful—

(1) For any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(A) in seeking, accepting, or holding any nonelective office or employment under the United States, to conceal or fail to disclose the fact that he is a member of such organization; or

(B) to hold any nonelective office or employment under the United States; or

(C) in seeking, accepting, or holding employment in any defense facility, to conceal or fail to disclose the fact that he is a member of such organization; or

(D) if such organization is a Communist-action organization, to engage in any employment in any defense facility; or

(E) to hold office or employment with any labor organization, as that term is defined in section 2(5) of the National Labor Relations Act, as amended (29 U. S. C. 152), or to represent any employer in any matter or proceeding arising or pending under that Act.[3]

(2) For any officer or employee of the United States or of any defense facility, with knowledge or notice that such organization is so registered or that such order has become final—

(A) to contribute funds or services to such organization; or

(B) to advise, counsel or urge any person, with knowledge or notice that such person is a member of such organization, to perform, or to omit to perform, any act if such act or omission would constitute a violation of any provision of subparagraph (1) of this subsection.

(b) The Secretary of Defense is authorized and directed to designate and proclaim, and from time to time revise, a list of facilities, as defined in paragraph (7) of section 3 of this title, with respect to the operation of which he finds and determines that the security of the United States requires the application of the provisions of subsection (a) of this section. The Secretary shall cause such list as designated and proclaimed, or any revision thereof, to be promptly published in the Federal Register, and shall promptly notify the management of any facility so listed; whereupon such management shall immediately post con-

[3] Added by sec. 6 of the Communist Control Act of 1954, 68 Stat. 777.

spicuously, and thereafter while so listed keep posted, notice of such designation in such form and in such place or places as to give reasonable notice thereof to all employees of, and to all applicants for employment in, such facility.

Denial of Passports to Members of Communist Organizations

Sec. 6. (a) When a Communist organization as defined in paragraph (5) of section 3 of this title is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

(2) to use or attempt to use any such passport.

(b) When an organization is registered, or there is in effect a final order of the Board requiring an organization to register, as a Communist-action organization, it shall be unlawful for any officer or employee of the United States to issue a passport to, or renew the passport of, any individual knowing or having reason to believe that such individual is a member of such organization.

Registration and Annual Reports of Communist Organizations

Sec. 7. (a) Each Communist-action organization (including any organization required, by a final order of the Board, to register as a Communist-action organization) shall, within the time specified in subsection (c) of this sec-

tion, register with the Attorney General; on a form prescribed by him by regulations, as a Communist-action organization.

(b) Each Communist-front organization (including any organization required, by a final order of the Board, to register as a Communist-front organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-front organization.

(c) The registration required by subsection (a) or (b) shall be made—

(1) in the case of an organization which is a Communist-action organization or a Communist-front organization on the date of the enactment of this title, within thirty days after such date;

(2) in the case of an organization becoming a Communist-action organization or a Communist-front organization after the date of the enactment of this title, within thirty days after such organization becomes a Communist-action organization or a Communist-front organization, as the case may be; and

(3) in the case of an organization which by a final order of the Board is required to register, within thirty days after such order becomes final.

(d) The registration made under subsection (a) or (b) shall be accompanied by a registration statement, to be prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the following information:

(1) The name of the organization and the address of its principal office.

(2) The name and last-known address of each individual who is at the time of filing of such registra-

tion statement, and of each individual who was at any time during the period of twelve full calendar months next preceding the filing of such statement, an officer of the organization, with the designation or title of the office so held, and with a brief statement of the duties and functions of such individual as such officer.

(3) An accounting, in such form and detail as the Attorney General shall by regulations prescribe, of all moneys received and expended (including the sources from which received and the purposes for which expended) by the organization during the period of twelve full calendar months next preceding the filing of such statement.

(4) In the case of a Communist-action organization, the name and last-known address of each individual who was a member of the organization at any time during the period of twelve full calendar months preceding the filing of such statement.

(5) In the case of any officer or member whose name is required to be shown in such statement, and who uses or has used or who is or has been known by more than one name, each name which such officer or member uses or has used or by which he is known or has been known.

(6) A listing, in such form and detail as the Attorney General shall by regulation prescribe, of all printing presses and machines including but not limited to rotary presses, flatbed cylinder presses, platen presses, lithographs, offsets, photo-offsets, mimeograph machines, multigraph machines, multilith machines, duplicating machines, ditto machines, linotype machines, intertype machines, monotype machines, and all other types of printing processes, typesetting machines or any mechanical devices used

or intended to be used, or capable of being used to produce or publish printed matter or material, which are in the possession, custody, ownership, or control of the Communist-action or Communist-front organization or its officers, members, affiliates, associates, group, or groups in which the Communist-action or Communist-front organization, its officers or members have an interest.[4]

(e) It shall be the duty of each organization registered under this section to file with the Attorney General on or before February 1 of the year following the year in which it registers, and on or before February 1 of each succeeding year, an annual report, prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the same information which by subsection (d) is required to be included in a registration statement, except that the information required with respect to the twelve-month period referred to in paragraph (2), (3), or (4) of such subsection shall, in such annual report, be given with respect to the calendar year preceding the February 1 on or before which such annual report must be filed.

(f) (1) It shall be the duty of each organization registered under this section to keep, in such manner and form as the Attorney General shall by regulations prescribe, accurate records and accounts of moneys received and expended (including the sources from which received and purposes for which expended) by such organization.

(2) It shall be the duty of each Communist-action organization registered under this section to keep, in such manner and form as the Attorney General shall by regulations prescribe, accurate records of the names and addresses of the members of such organizations and of persons who actively participate in the activities of such organization.

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[4] Added by P. L. 557, 83d Cong., 2d Sess., 68 Stat. 586.

(g) It shall be the duty of the Attorney General to send to each individual listed in any registration statement or annual report, filed under this section, as an officer or member of the organization in respect of which such registration statement or annual report was filed, a notification in writing that such individual is so listed; and such notification shall be sent at the earliest practicable time after the filing of such registration statement or annual report. Upon written request of any individual so notified who denies that he holds any office or membership (as the case may be) in such organization, the Attorney General shall forthwith initiate and conclude at the earliest practicable time an appropriate investigation to determine the truth or falsity of such denial, and, if the Attorney General shall be satisfied that such denial is correct, he shall thereupon strike from such registration statement or annual report the name of such individual. If the Attorney General shall decline or fail to strike the name of such individual from such registration statement or annual report within five months after receipt of such written request, such individual may file with the Board a petition for relief pursuant to section 13(b) of this title.

(h) In the case of failure on the part of any organization to register or to file any registration statement or annual report as required by this section, it shall be the duty of the executive officer (or individual performing the ordinary and usual duties of an executive officer) and of the secretary (or individual performing the ordinary and usual duties of the secretary) of such organization, and of such officer or officers of such organization as the Attorney General shall by regulations prescribe, to register for such organization, to file such registration statement, or to file such annual report, as the case may be.

REGISTRATION OF MEMBERS OF COMMUNIST-ACTION ORGANIZATIONS

SEC. 8 (a) Any individual who is or becomes a member of any organization concerning which (1) there is in effect a final order of the Board requiring such organization to register under section 7(a) of this title as a Communist-action organization, (2) more than thirty days have elapsed since such order has become final, and (3) such organization is not registered under section 7 of this title as a Communist-action organization, shall within sixty days after said order has become final, or within thirty days after becoming a member of such organization, whichever is later, register with the Attorney General as a member of such organization.

(b) Each individual who is or becomes a member of any organization which he knows to be registered as a Communist-action organization under section 7(a) of this title, but to have failed to include his name upon the list of members thereof filed with the Attorney General, pursuant to the provisions of subsections (d) and (e) of section 7 of this title, shall, within sixty days after he shall have obtained such knowledge, register with the Attorney General as a member of such organization.

(c) The registration made by any individual under subsection (a) or (b) of this section shall be accompanied by a registration statement to be prepared and filed in such manner and form, and containing such information, as the Attorney General shall by regulations prescribe.

KEEPING OF REGISTERS; PUBLIC INSPECTION; REPORTS TO PRESIDENT AND CONGRESS

SEC. 9. (a) The Attorney General shall keep and maintain separately in the Department of Justice—

(1) a "Register of Communist-Action Organizations", which shall include (A) the names and

addresses of all Communist-action organizations registered under section 7, (B) the registration statements and annual reports filed by such organizations thereunder, and (C) the registration statements filed by individuals under section 8; and

(2) a "Register of Communist-Front Organizations", which shall include (A) the names and addresses of all Communist-front organizations registered under section 7, and (B) the registration statements and annual reports filed by such organizations thereunder.

(b) Such registers shall be kept and maintained in such manner as to be open for public inspection: *Provided*, That the Attorney General shall not make public the name of any individual listed in either such register as an officer or member of any Communist organization until sixty days shall have elapsed after the transmittal of the notification required by section 7(g) to be sent to such individual, and if prior to the end of such period such individual shall make written request to the Attorney General for the removal of his name from any such list, the Attorney General shall not make public the name of such individual until six months shall have elapsed after receipt of such request by the Attorney General, or until thirty days shall have elapsed after the Attorney General shall have denied such request and shall have transmitted to such individual notice of such denial, whichever is earlier.

(c) The Attorney General shall submit to the President and to the Congress on or before June 1 of each year (and at any other time when requested by either House by resolution) a report with respect to the carrying out of the provisions of this title, including the names and addresses of the organizations listed in such registers and (except to the extent prohibited by subsection (b) of this section) the names and addresses of the individuals listed as members of such organizations.

(d) Upon the registration of each Communist organization under the provisions of this title, the Attorney General shall publish in the Federal Register the fact that such organization has registered as a Communist-action organization, or as a Communist-front organization, as the case may be, and the publication thereof shall constitute notice to all members of such organization that such organization has so registered.

USE OF THE MAILS AND INSTRUMENTALITIES OF INTERSTATE OR FOREIGN COMMERCE

SEC. 10. It shall be unlawful for any organization which is registered under section 7, or for any organization with respect to which there is in effect a final order of the Board requiring it to register under section 7, or determining that it is a Communist-infiltrated organization,[5] or for any person acting for or on behalf of any such organization—

(1) to transmit or cause to be transmitted, through the United States mails or by any means or instrumentality of interestate or foreign commerce, any publication which is intended to be, or which it is reasonable to believe is intended to be, circulated or disseminated among two or more persons, unless such publication, and any envelope, wrapper, or other container in which it is mailed or otherwise circulated or transmitted, bears the following, printed in such manner as may be provided in regulations prescribed by the Attorney General, with the name or the organization appearing in lieu of the blank: "Disseminated by ————————————, a Communist organization"; or

(2) to broadcast or cause to be broadcast any matter over any radio or television station in the

[5] Reference to Communist-infiltrated organizations added by sec. 8(a) of the Communist Control Act of 1954, 68 Stat. 778.

United States, unless such matter is preceded by the following statement, with the name of the organization being stated in place of the blank: "The following program is sponsored by ————————, a Communist organization".

DENIAL OF TAX DEDUCTIONS AND EXEMPTIONS

SEC. 11. (a) Nothwithstanding any other provisions of law, no deduction for Federal income-tax purposes shall be allowed in the case of a contribution to or for the use of any organization if at the time of the making of such contribution (1) such organization is registered under section 7, or (2) there is in effect a final order of the Board requiring such organization to register under section 7 or determining that it is a Communist-infiltrated organization.[6]

(b) No organization shall be entitled to exemption from Federal income tax, under section 101 of the Internal Revenue Code, for any taxable year if at any time during such taxable year (1) such organization is registered under section 7, or (2) there is in effect a final order of the Board requiring such organization to register under section 7 or determining that it is a Communist-infiltrated organization.[7]

SUBVERSIVE ACTIVITIES CONTROL BOARD

Sec. 12. (a) There is hereby established a board, to be known as the Subversive Activities Control Board, which shall be composed of five members, who shall be appointed by the President, by and with the advice and consent of the Senate Not more than three members of the Board shall be members of the same political party. The terms of office of the members of the Board in office on the date of enactment of the Subversive Activities Control Board Tenure

[6] See footnote 5.
[7] See footnote 5.

Act, shall expire at the time they would have expired if such Act had not been enacted. The term of office of each member of the Board, appointed after the date of enactment of the Subversive Activities Control Board Tenure Act shall be for five years from the date of expiration of the terms of his predecessor, except, that (1) the terms of office of that member of the Board who is designated by the President and is appointed to succeed one of the two members of the Board whose terms expire on August 9, 1955, shall be for five years from the date of expiration of the terms of his predecessor, and (2) the term of office of any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be for the remainder of the term of his predecessor. Upon the expiration of his term of office a member of the Board shall continue to serve until his successor shall have been appointed and shall have qualified.[8] The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) Any vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and three members of the Board shall, at all times, constitute a quorum. The Board shall have an official seal which shall be judicially noticed.

(c) The Board shall at the close of each fiscal year make a report in writing to the Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees of the Board, and an account of all moneys it has disbursed.

(d) Each member of the Board shall receive a salary of $20,000 a year,[9] shall be eligible for reappointment, and

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[8] Provisions relating to tenure amended by the Subversive Activities Control Board Tenure Act, 69 Stat. 539.

[9] Originally $12,500. Raised to present figure for Board members and $20,500 for the Board Chairman by secs. 105 and 106 of the Federal Executive Pay Act of 1956, P. L. 854, 84th Cong., 2d Sess.

shall not engage in any other business, vocation, or employment.

(e) It shall be the duty of the Board—

(1) upon application made by the Attorney General under section 13(a) of this title, or by any organization under section 13(b) of this title, to determine whether any organization is a "Communist-action organization" within the meaning of paragraph (3) of section 3 of this title, or a "Communist-front organization" within the meaning of paragraph (4) of section 3 of this title; and

(2) upon application made by the Attorney General under section 13(a) of this title, or by any individual under section 13(b) of this title, to determine whether any individual is a member of any Communist-action organization registered, or by final order of the Board required to be registered, under section 7(a) of this title; and

(3) upon any application made under subsection (a) or subsection (b) of section 13A of this title, to determine whether any organization is a Communist-infiltrated organization.[10]

(f) Subject to the civil-service laws and Classification Act of 1949, the Board may appoint and fix the compensation of a chief clerk and such examiners and other personnel as may be necessary for the performance of its functions.

(g) The Board may make such rules and regulations, not inconsistent with the provisions of this title, as may be necessary for the performance of its duties.

(h) There are hereby authorized to be appropriated to the Board such sums as may be necessary to carry out its functions.

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[10] Added by sec. 9(a) of the Communist Control Act of 1954, 68 Stat. 778.

REGISTRATION PROCEEDINGS BEFORE BOARD [11]

SEC. 13. (a) Whenever the Attorney General shall have reason to believe that any organization which has not registered under subsection (a) or subsection (b) of section 7 of this title is in fact an organization of a kind required to be registered under such subsection, or that any individual who has not registered under section 8 of this title is in fact required to register under such section, he shall file with the Board and serve upon such organization or individual a petition for an order requiring such organization or individual to register pursuant to such subsection or section, as the case may be. Each such petition shall be verified under oath, and shall contain a statement of the facts upon which the Attorney General relies in support of his prayer for the issuance of such order.

(b) Any organization registered under subsection (a) or subsection (b) of section 7 of this title, and any individual registered under section 8 of this title, may, not oftener than once in each calendar year, make application to the Attorney General for the cancellation of such registration and (in the case of such organization) for relief from obligation to make further annual reports. Within sixty days after the denial of any such application by the Attorney General, the organization or individual concerned may file with the Board and serve upon the Attorney General a petition for an order requiring the cancellation of such registration and (in the case of such organization) relieving such organization of obligation to make further annual reports. Any individual authorized by section 7(g) of this title to file a petition for relief may file with the Board and serve upon the Attorney General a petition for an order requiring the Attorney General to strike his name from the registration statement or annual report upon which it appears.

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[11] "Registration" added by sec. 9(b) of the Communist Control Act of 1954, 68 Stat. 778.

(c) Upon the filing of any petition pursuant to subsection (a) or subsection (b) of this section, the Board (or any member thereof or any examiner designated thereby) may hold hearings, administer oaths and affirmations, may examine witnesses and receive evidence at any place in the United States, and may require by subpoena the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records deemed relevant, to the matter under inquiry. Subpoenas may be signed and issued by any member of the Board or any duly authorized examiner. Subpoenas shall be issued on behalf of the organization or the individual who is a party to the proceeding upon request and upon a statement or showing of general relevance and reasonable scope of the evidence sought. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States at any designated place of hearing. Witnesses summoned shall be paid the same fees and mileage paid witnesses in the district courts of the United States. In cases of disobedience to a subpoena, the Board may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring such person to appear (and to produce documentary evidence if so ordered) and give evidence relating to the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. No person shall be held liable in any action in any court, State or Federal, for any damages resulting from (1) his production of any documentary

evidence in any proceeding before the Board if he is required, by a subpoena issued under this subsection, to produce the evidence; or (2) any statement under oath he makes in answer to a question he is asked while testifying before the Board in response to a subpoena issued under this subsection, if the statement is pertinent to the question.

(d)(1) All hearings conducted under this section shall be public. Each party to such proceeding shall have the right to present its case with the assistance of counsel, to offer oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. An accurate stenographic record shall be taken of the testimony of each witness, and a transcript of such testimony shall be filed in the office of the Board.

(2) Where an organization or individual declines or fails to appear at a hearing accorded to such organization or individual by the Board pursuant to this section, the Board, may, without further proceedings and without the introduction of any evidence, enter an order requiring such organization or individual to register or denying the application of such organization or individual, as the case may be. Where in the course of any hearing before the Board or any examiner thereof a party or counsel is guilty of misbehavior which obstructs the hearing, such party or counsel may be excluded from further participation in the hearing.

(e) In determining whether any organization is a "Communist-action organization", the Board shall take into consideration—

(1) the extent to which its policies are formulated and carried out and its activities performed, pursuant to directives or to effectuate the policies of the foreign government or foreign organization in which

is vested, or under the domination or control of which is exercised, the direction and control of the world Communist movement referred to in section 2 of this title; and

(2) the extent to which its views and policies do not deviate from those of such foreign government or foreign organization; and

(3) the extent to which it receives financial or other aid, directly or indirectly, from or at the direction of such foreign government or foreign organization; and

(4) the extent to which it sends members or representatives to any foreign country for instruction or training in the principles, policies, strategy, or tactics of such world Communist movement; and

(5) the extent to which it reports to such foreign government or foreign organization or to its representatives; and

(6) the extent to which its principal leaders or a substantial number of its members are subject to or recognize the disciplinary power of such foreign government or foreign organization or its representatives; and

(7) the extent to which, for the purpose of concealing foreign direction, domination, or control, or of expediting or promoting its objectives, (i) it fails to disclose, or resists efforts to obtain information as to, its membership (by keeping membership lists in code, by instructing members to refuse to acknowledge membership, or by any other method); (ii) its members refuse to acknowledge membership therein; (iii) it fails to disclose, or resists efforts to obtain information as to, records other than membership lists; (iv) its meetings are secret; and (v) it otherwise operates on a secret basis; and

(8) the extent to which its principal leaders or a substantial number of its members consider the allegiance they owe to the United States as subordinate to their obligations to such foreign government or foreign organization.

(f) In determining whether any organization is a "Communist-front organization", the Board shall take into consideration—

(1) the extent to which persons who are active in its management, direction, or supervision, whether or not holding office therein, are active in the management, direction, or supervision of, or as representatives of, any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and

(2) the extent to which its support, financial or otherwise, is derived from any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and

(3) the extent to which its funds, resources, or personnel are used to further or promote the objectives of any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and

(4) the extent to which the position taken or advanced by it from time to time on matters of policy do not deviate from those of any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2.

(g) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

(1) that an organization is a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such organization an order requiring such organization to register as such under section 7 of this title; or

(2) that an individual is a member of a Communist-action organization (including an organization required by final order of the Board to register under section 7(a)), it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such individual an order requiring him to register as such under section 8 of this title.

(h) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

(1) that an organization is not a Communist-action organization or Communist-front organization as the case may be, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order denying his petition for an order requiring such organization to register as such under section 7 of this title; and send a copy of such order to such organization; or

(2) that an individual is not a member of any Communist-action organization, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order denying his petition for an order requiring such individual to register as such member under section 8 of this title; and send a copy of such order to such individual.

(i) If, after hearing upon a petition filed under subsection (b) of this section, the Board determines—

(1) that an organization is not a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order requiring him to cancel the registration of such organization and relieve it from the requirement of further annual report; and send a copy of such order to such organization; or

(2) that an individual is not a member of any Communist-action organization, or (in the case of an individual listed as an officer of a Communist-front organization) that an individual is not an officer of a Communist-front organization, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order requiring him to (A) strike the name of such individual from the registration statement or annual report upon which it appears or (B) cancel the registration of such individual under section 8, as may be appropriate; and send a copy of such order to such individual.

(j) If, after hearing upon a petition filed under subsection (b) of this section, the Board determines—

(1) that an organization is a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such organization an order denying its petition for the cancellation of its registration and for relief from the requirement of further annual reports; or

(2) that an individual is a member of a Communist-action organization, or (in the case of an individual listed as an officer of a Communist-front organization) that an individual is an officer of a

Communist-front organization, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such individual an order denying his petition for an order requiring the Attorney General (A) to strike his name from any registration statement or annual report on which it appears or (B) to cancel the registration of such individual under section 8, as the case may be.

(k) When an order of the Board requiring registration of a Communist organization becomes final under the provisions of section 14(b) of this title, the Board shall publish in the Federal Register the fact that such order has become final, and publication thereof shall constitute notice to all members of such organization that such order has become final.

PROCEEDINGS WITH RESPECT TO COMMUNIST-INFILTRATED ORGANIZATIONS[12]

SEC. 13A. (a) Whenever the Attorney General has reason to believe that any organization is a Communist-infiltrated organization, he may file with the Board and serve upon such organization a petition for a determination that such organization is a Communist-infiltrated organization. In any proceeding so instituted, two or more affiliated organizations may be named as joint respondents. Whenever any such petition is accompanied by a certificate of the Attorney General to the effect that the proceeding so instituted is one of exceptional public importance, such proceeding shall be set for hearing at the earliest possible time and all proceedings therein before the Board or any court shall be expedited to the greatest practicable extent.

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[12] Section added by sec. 10 of the Communist Control Act of 1954, 68 Stat. 778.

(b) Any organization which has been determined under this section to be a Communist-infiltrated organization may, within six months after such determination, file with the Board and serve upon the Attorney General a petition for a determination that such organization no longer is a Communist-infiltrated organization.

(c) Each such petition shall be verified under oath, and shall contain a statement of the facts relied upon in support thereof. Upon the filing of any such petition, the Board shall serve upon each party to such proceeding a notice specifying the time and place for hearing upon such petition. No such hearing shall be conducted within twenty days after the service of such notice.

(d) The provisions of subsections (c) and (d) of section 13 shall apply to hearings conducted under this section, except that upon the failure of any organization named as a party in any petition filed by or duly served upon it pursuant to this section to appear at any hearing upon such petition, the Board may conduct such hearing in the absence of such organization and may enter such order under this section as the Board shall determine to be warranted by evidence presented at such hearing.

(e) In determining whether any organization is a Communist-infiltrated organization, the Board shall consider—

(1) to what extent, if any, the effective management of the affairs of such organization is conducted by one or more individuals who are, or within three years have been, (A) members, agents, or representatives of any Communist organization, and Communist foreign government, or the world Communist movement referred to in section 2 of this title, with knowledge of the nature and purpose thereof, or (B) engaged in giving aid or support to any such organization, government, or movement with knowledge of the nature and purpose thereof;

(2) to what extent, if any, the policies of such organization are, or within three years have been, formulated and carried out pursuant to the direction or advice of any member, agent, or representative of any such organization, government, or movement;

(3) to what extent, if any, the personnel and resources of such organization are, or within three years have been used to further or promote the objectives of any such Communist organization, government, or movement;

(4) to what extent, if any, such organization within three years has received from, or furnished to or for the use of, any such Communist organization, government, or movement any funds or other material assistance;

(5) to what extent, if any, such organization is, or within three years has been, affiliated in any way with any such Communist organization, government, or movement;

(6) to what extent, if any, the affiliation of such organization or of any individual or individuals who are members thereof or who manage its affairs, with any such Communist organization, government, or movement is concealed from or is not disclosed to the membership of such organization; and

(7) to what extent, if any, such organization or any of its members or managers are, or within three years have been, knowingly engaged—

(A) in any conduct punishable under section 4 or 15 of this Act or under chapters 37, 105, 115 of title 18 of the United States Code; or

(B) with intent to impair the military strength of the United States or its industrial capacity to furnish logistical or other support re-

quired by its armed forces, in any activity resulting in or contributing to any such impairment.

(f) After hearing upon any petition filed under this section, the Board shall (1) make a report in writing in which it shall state findings as to the facts and its conclusion with respect to the issues presented by such petition, (2) enter its order granting or denying the determination sought by such petition, and (3) serve upon each party to the proceeding a copy of such order. Any order granting any determination on the question whether any organization is a Communist-infiltrated organization shall become final as provided in section 14(b) of this Act.

(g) When any order has been entered by the Board under this section with respect to any labor organization or employer (as these terms are defined by section 2 of the National Labor Relations Act, as amended, and which are organizations within the meaning of section 3 of the Subversive Activities Control Act of 1950), the Board shall serve a true and correct copy of such order upon the National Labor Relations Board and shall publish in the Federal Register a statement of the substance of such order and its effective date.

(h) When there is in effect a final order of the Board determining that any such labor organization is a Communist-action organization, a Communist-front organization, or a Communist-infiltrated organization, such labor organization shall be ineligible to—

(1) act as representative of any employee within the meaning or for the purposes of section 7 of the National Labor Relations Act, as amended (29 U. S. C. 157);

(2) serve as an exclusive representative of employees of any bargaining unit under section 9 of such Act, as amended (29 U. S. C. 159);

(3) make, or obtain any hearing upon, any charge under section 10 of such Act (29 U. S. C. 160); or

(4) exercise any other right or privilege, or receive any other benefit, substantive or procedural, provided by such Act for labor organizations.

(i) When an order of the Board determining that any such labor organization is a Communist-infiltrated organization has become final, and such labor organization theretofore has been certified under the National Labor Relations Act, as amended, as a representative of employees in any bargaining unit—

(1) a question of representation affecting commerce, within the meaning of section 9(c) of such Act, shall be deemed to exist with respect to such bargaining unit; and

(2) the National Labor Relations Board, upon petition of not less than 20 per centum of the employees in such bargaining unit or any person or persons acting in their behalf, shall under section 9 of such Act (notwithstanding any limitation of time contained therein) direct elections in such bargaining unit or any subdivision thereof (A) for the selection of a representative thereof for collective bargaining purposes, and (B) to determine whether the employees thereof desire to rescind any authority previously granted to such labor organization to enter into any agreement with their employer pursuant to section 8(a) (3)(ii) of such Act.

(j) When there is in effect a final order of the Board determining that any such employer is a Communist-infiltrated organization, such employer shall be ineligible to—

(1) file any petition for an election under section 9 of the National Labor Relations Act, as amended

(29 U. S. C. 157), or participate in any proceeding under such section; or

(2) make or obtain any hearing upon any charge under section 10 of such Act (29 U. S. C. 160); or

(3) exercise any other right or privileege or receive any other benefit, substantive or procedural, provided by such Act for employers.

JUDICIAL REVIEW

SEC. 14. (a) The party aggrieved by any order entered by the Board under subsections (g), (h), (i), or (j) of section 13, or subsection (f) of section 13A,[13] may obtain a review of such order by filing in the United States Court of Appeals for the District of Columbia, within sixty days from the date of service upon it of such order, a written petition praying that the order of the Board be set aside. A copy of such petition shall forthwith be transmitted by the clerk of the court to the Board, and thereupon the Board shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon the filing of such petition the court shall have jurisdiction of the proceeding and shall have power to affirm or set aside the order of the Board; but the court may in its discretion and upon its own motion transfer any action so commenced to the United States Court of Appeals for the circuit wherein the petitioner resides. The findings of the Board as to the facts, if supported by the preponderance of the evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material, the court may order such additional evidence to be taken before the

[13] Matter between commas added by section 11 of the Communist Control Act of 1954, 68 Stat. 780.

Board and to be adduced upon the proceeding in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by the preponderance of the evidence shall be conclusive, and its recommendations, if any, with respect to action in the matter under consideration. If the court shall set aside an order issued under subsection (j) of section 13 it may, in the case of an organization, enter a judgment canceling the registration of such organization and relieving it from the requirement of further annual reports, or in the case of an individual, enter a judgment requiring the Attorney General (A) to strike the name of such individual from the registration statement or annual report on which it appears, or (B) cancel the registration of such individual under section 8, as may be appropriate. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in title 28, United States Code, section 1254.

(b) Any order of the Board issued under section 13, or subsection (f) of section 13A,[14] shall become final—

(1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

(2) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Board has been affirmed or the petition for review dismissed by a United States Court of Appeals, and no petition for certiorari has been duly filed; or

(3) upon the denial of a petition for certiorari, if the order of the Board has been affirmed or the

[14] See footnote 13.

petition for review dismissed by a United States Court of Appeals; or

(4) upon the expiration of ten days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Board be affirmed or the petition for review dismissed.

PENALTIES

SEC. 15. (a) If there is in effect with respect to any organization or individual a final order of the Board requiring registration under section 7 or section 8 of this title—

(1) such organization shall, upon conviction of failure to register, to file any registration statement or annual report, or to keep records as required by section 7, be punished for each such offense by a fine of not more than $10,000, and

(2) each individual having a duty under subsection (h) of section 7 to register or to file any registration statement or annual report on behalf of such organization, and each individual having a duty to register under section 8, shall, upon conviction of failure to so register or to file any such registration statement or annual report, be punished for each such offense by a fine of not more than $10,000, or imprisonment for not more than five years, or by both such fine and imprisonment.

For the purposes of this subsection, each day of failure to register, whether on the part of the organization or any individual, shall constitute a separate offense.

(b) Any individual who, in a registration statement or annual report filed under section 7 or section 8, wilfully makes any false statement or willfully omits to state any fact which is required to be stated, or which is necessary to

make the statements made or information given not misleading, shall upon conviction thereof be punished for each such offense by a fine of not more than $10,000, or by imprisonment for not more than five years, or by both such fine and imprisonment. For the purposes of this subsection—

(1) each false statement wilfully made, and each wilful omission to state any fact which is required to be stated, or which is necessary to make the statements made or information given not misleading, shall constitute a separate offense; and

(2) each listing of the name or address of any one individual shall be deemed to be a separate statement.

(c) Any organization which violates any provision of section 10 of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than $10,000. Any individual who violates any provision of sections 5, 6, or 10 of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than $10,000 or by imprisonment for not more than five years, or by both such fine and imprisonment.

APPLICABILITY OF ADMINISTRATIVE PROCEDURE ACT

SEC. 16. Nothing in this title shall be held to make the provisions of the Administrative Procedure Act inapplicable to the exercise of functions, or the conduct of proceedings, by the Board under this title.

EXISTING CRIMINAL STATUTES

SEC. 17. The foregoing provisions of this title shall be construed as being in addition to and not in modification of existing criminal statutes.

* * *

Immigration and Nationality Act

Pertinent provisions of sections 22 and 25 of the Subversive Activities Control Act have been carried forward in the Immigration and Nationality Act, 66 Stat. 163, adopted June 27, 1952, 8 U. S. C. secs. 1182, 1251, 1424, 1451, as follows:

SEC. 212. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * *

(28) Aliens who are, or at any time have been, members of any of the following classes:

* * *

(E) Aliens not within any of the other provisions of this paragraph, who are members of or affiliated with any organization during the time it is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950, unless such aliens establish ~~that they~~ did not have knowledge or reason to believe at the time they became members of or affiliated with such an organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist organization.

SEC. 241. (a) Any alien in the United States (including any alien crewman) shall, upon the order of the Attorney General, be deported who—

* * *

(6) is or at any time has been, after entry, a member of any of the following classes of aliens:

* * * *

(E) Aliens not within any of the other provisions of this paragraph, who are members of or affiliated with any organization during the time it is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950, unless such aliens establish that they did not have knowledge or reason to believe at the time they became members of or affiliated with such organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist organization.

SEC. 313. (a) Notwithstanding the provisions of section 405(b), no person shall hereafter be naturalized as a citizen of the United States—

* * *

(2) * * * (G) who, regardless of whether he is within any of the other provisions of this section, is a member of or affiliated with any Communist-action organization during the time it is registered or required to be registered under the provisions of section 7 of the Subversive Activities Control Act of 1950; or (H) who, regardless of whether he is within any of the other provisions of this section, is a member of or affiliated with any Communist-front organization during the time it is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950, unless such alien establishes that he did not have knowledge or reason to believe at the time he became a member of or affiliated with such an organization (and did not thereafter and prior to the date upon which such organization was so registered or so re-

quired to be registered have such knowledge or reason to believe) that such organization was a Communist-front organization.

SEC. 340. * * * (c) If a person who shall have been naturalized after the effective date of this Act[15] shall within five years next following such naturalization become a member of or affiliated with any organization, membership in or affiliation with which at the time of naturalization would have precluded such person from naturalization under the provisions of section 313, it shall be considered prima facie evidence that such person was not attached to the principles of the Constitution of the United States and was not well disposed to the good order and happiness of the United States at the time of naturalization, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively.

Communist Control Act

The Communist Control Act of 1954, 68 Stat. 775, 50 U. S. C. §§ 841-44, provides in part as follows:

FINDINGS OF FACT

SEC. 2. The Congress hereby finds and declares that the Communist Party of the United States, although purport-

[15] The introductory clause of section 25(d) of the Subversive Activities Control Act reads "If a person who shall have been naturalized after January 1, 1951 * * *."

edly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchical chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear, present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their

revolutionary services. Therefore, the Communist Party should be outlawed.

PROSCRIBED ORGANIZATIONS

SEC. 3. The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organizaton by reason of the laws of the United States or any political subdivision thereof, are hereby terminated: *Provided, however,* That nothing in this section shall be construed as amending the Internal Security Act of 1950, as amended.

SEC. 4. Whoever knowingly and willfully becomes or remains a member of (1) the Communist Party, or (2) any other organization having for one of its purposes or objectives the establishment, control, conduct, seizure, or overthrow of the Government of the United States, or the government of any State or political subdivision thereof, by the use of force or violence, with knowledge of the purpose or objective of such organization shall be subject to all the provisions and penalties of the Internal Security Act of 1950, as amended, as a member of a "Communist-action" organization.

(b) For the purpose of this section, the term "Communist Party" means the organization now known as the Communist Party of the United States of America, the

Communist Party of any State or subdivision thereof, and any unit or subdivision of any such organization, whether or not any change is hereafter made in the name thereof.

SEC. 5. In determining membership or participation in the Communist Party, or any other organization defined in this Act, or knowledge of the purpose or objective of such party or organization, the jury, under instructions from the court, shall consider evidence, if presented, as to whether the accused person:

(1) Has been listed to his knowledge as a member in any book or any of the lists, records, correspondence, or any other document of the organization;

(2) Has made financial contribution to the organization in dues, assessments, loans, or in any other form;

(3) Has made himself subject to the discipline of the organization in any form whatsoever;

(4) Has executed orders, plans, or directives of any kind of the organization;

(5) Has acted as an agent, courier, messenger, correspondent, organizer, or in any other capacity in behalf of the organization;

(6) Has conferred with officers or other members of the organization in behalf of any plan or enterprise of the organization;

(7) Has been accepted to his knowledge as an officer or member of the organization or as one to be called upon for services by other officers or members of the organization;

(8) Has written, spoken or in any other way communicated by signal, semaphore, sign, or in any other form of communication orders, directives, or plans of the organization;

(9) Has prepared documents, pamphlets, leaflets, books or any other type of publication in behalf of the objectives and purposes of the organization;

(10) Has mailed, shipped, circulated, distributed, delivered, or in any other way sent or delivered to others material or propaganda of any kind in behalf of the organization;

(11) Has advised, counseled or in any other way imparted information, suggestions, recommendations to officers or members of the organization or to anyone else in behalf of the objectives of the organization;

(12) Has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes of the organization;

(13) Has in any other way participated in the activities, planning, actions, objectives, or purposes of the organization;

(14) The enumeration of the above subjects of evidence on membership or participation in the Communist Party or any other organization as above defined, shall not limit the inquiry into and consideration of any other subject of evidence on membership and participation as herein stated.

* * * [16]

SEC. 12. If any provision of this title or the application thereof to any person or circumstances is held invalid, the remainder of the title, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

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[16] The omitted sections amend the Subversive Activities Control Act.

Social Security Act

The Social Security Act, as amended, provides in part as follows, 70 Stat. 824, 828, 839, 42 U. S. C. 410:

(a) The term "employment" means * * * any service, of whatever nature, performed after 1950 * * * (A) by an employee for the person employing him, irrespective of the residence or citizenship of either, (i) within the United States * * * except that, in the case of service performed after 1950, such term shall not include—

* * *

(17) Service in the employ of any organization which is performed (A) in any quarter during any part of which such organization is registered, or there is in effect a final order of the Subversive Activities Control Board requiring such organization to register, under the Internal Security Act of 1950, as amended, as a Communist-action organization, a Communist-front organization, or a Communist-infiltrated organization, and (B) after June 30, 1956.